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Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 2711

United States

Circuit Court of Appeals

For the Ninth Circuit.

MILLER & LUX INCORPORATED, a Corporation,
Plaintiff in Error,

vs.

SAVERIO DI GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Southern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2711

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Plaintiff in Error:

EDWARD F. TREADWELL, Esq., 1323 Merchants Exchange Building, San Francisco, California.

For Defendant in Error:

J. J. DUNNE, Esq., Mills Building, San Francisco, California; and MERCER H. FARRAR, Esq., 505 California Street, San Francisco, California. [4*]

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO di GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corporation),

Defendant.

Writ of Error.

The United States of America,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Ninth Judicial Circuit in and for

*Page number appearing at foot of page of original certified Record.

the Southern District of California, Northern Division, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said District Court before you, between Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, plaintiff, and Miller & Lux, Incorporated, a corporation, defendant, a manifest error hath happened, to the great damage of the said defendant, Miller & Lux, Incorporated, a corporation and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit [5] Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, on the 4th day of October next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid may be inspected and the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS the Hon. EDWARD D. WHITE, Chief Justice of the United States, this 7th day of September, in the year of our Lord, one thousand

nine hundred and fifteen, and of the independence of the United States the one hundred and fortieth.

WM. M. VAN DYKE,
Clerk of the District Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.

By S. Leslie Colyer,
Deputy Clerk.

The above writ of error is hereby allowed.

OSCAR A. TRIPPET,
District Judge.

I hereby certify that a copy of the within writ of error was on the 7th day of September, 1915, lodged in the clerk's office of said United States District Court for the Southern District of California, Northern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk United States District Court, Southern District of California.

By Leslie S. Colyer,
Deputy Clerk. [6]

[Endorsed]: No. 42—Civ. In the United States District Court in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, etc., Plaintiff, vs. Miller & Lux, Incorporated, Defendant. Writ of Error. Filed Sept. 7, 1915. Wm. M. Ván Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [7]

In the United States District Court in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO di GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corporation),

Defendant.

Citation.

The United States of America,—ss.

To Saverio di Giovanni Petrocelli, as Administrator of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, in the State of California, on the 4th day of October, 1915, pursuant to a writ of error on file in the clerk's office of the District Court of the United States of the Ninth Judicial Circuit, in and for the Southern District of California, Northern Division, in that certain action No. 42—Civil, wherein Miller & Lux, Incorporated, is plaintiff in error and you, said Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina,

sometimes known as Peter Spino, deceased, are defendant in error, to show cause, if any there be, why the judgment given, made and entered against the said Miller & Lux, Incorporated, a corporation, in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf. [8]

WITNESS the HON. OSCAR A. TRIPPET, United States District Judge for the Southern District of California, and one of the Judges of the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California, this 7th day of September, A. D. 1915, and of the independence of the United States the one hundred and fortieth.

OSCAR A. TRIPPET,
United States District Judge for the Southern District of California.

Service of the foregoing citation is hereby acknowledged this 7th day of September, 1915, saving and reserving all objections and exceptions to the regularity and sufficiency of the proceedings herein, and of each of them.

M. H. FARRAR,
J. J. DUNNE,
Attorneys for Defendant in Error. [9]

[Endorsed]: 42—Civ. U. S. Dist. Court, So. Dist. Cal., No. Div. S. di G. Petrocelli, as Admr. etc., vs. Miller & Lux, Inc. Citation. Filed Sept. 7, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [10]

In the District Court of the United States of America in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO di GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA (Sometimes Known as PETER SPINO), Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corporation),

Defendant.

[11]

In the Superior Court of the State of California, in and for the County of Merced.

G. E. NORDGREN, as Administrator of the Estate of PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, a Corporation,

Defendant.

Complaint.

Plaintiff complains of defendant and for cause of action against defendant, alleges:

I.

That said defendant is, and at all times herein mentioned was, a corporation, organized and existing under and by virtue of the laws of the State

of California, or some other State in the United States, unknown to plaintiff.

II.

That said plaintiff is, and at all times herein mentioned was, the duly elected, qualified and acting public administrator of the county of Merced, State of California; that on or about the 26th day of July, 1912, the plaintiff was duly appointed administrator of the estate of Peter Spino, deceased, and ever since has been and now is the duly appointed, qualified and acting administrator of the estate of said Peter Spino, deceased.

III.

That Peter Spino died, at and in the county of Merced, State of California, on or about the 1st day of July, A. D. [12] 1912; that at and before the time of the death of said Peter Spino, and at all times herein mentioned, the said Peter Spino was employed by said defendant in the business or occupation of driving a certain harvester team, composed of and consisting of 32 mules, or thereabouts, at what is known as the Midway Camp, or ranch, of the said defendant corporation, in the county of Merced, State of California.

That on or about said 1st day of July, 1912, the defendant carelessly and negligently caused and permitted one Twining, who was then and there in the employ of said defendant corporation, to frighten said harvester team, which said Peter Spino was then driving, and did thereby carelessly and negligently cause said team to become frightened and to run away, which caused said Peter Spino to

be thrown and precipitated from the seat on which he was riding to the ground and to be run over by the harvester, which was then and there being propelled by said team of mules, which said Peter Spino was then and there driving.

That by reason of so falling and being run over by said harvester the said Peter Spino sustained great and violent injury from which he thereafter, to wit, on said 1st day of July, 1912, died.

IV.

That the heirs at law of said Peter Spino, deceased, are a wife, to wit, Jovetta Spino, aged about 35 years, and a minor child, to wit, Sunda Spino, aged about six years residing with said widow in said Kingdom of Italy, and being residents of the Kingdom of Italy.

That during his lifetime said Peter Spino was constantly employed as a laborer and earned large sums of money as wages, [13] and constantly contributed a large part of his said earnings towards the support and maintenance of said wife and child, and that by reason of his said death as aforesaid the said wife and child have been deprived of such further maintenance and support to their great injury and damage.

V.

That plaintiff prosecutes this action for and on behalf of the said wife and minor child of said Peter Spino, as the personal representative of said deceased.

That by reason of the premises and in the particulars above set forth plaintiff has suffered and

sustained damage in the sum of $25,000.

WHEREFORE, plaintiff prays the judgment of this court against defendant for the sum of $25,000, and for costs of suit herein.

J. J. GRIFFIN and
BRICKLEY & SCHINO,
Attorneys for Plaintiff.

State of California,
County of Merced,—ss.

G. E. Nordgren, being duly sworn, deposes and says: That he is the plaintiff in the foregoing action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to such matters he believes it to be true.

G. E. NORDGREN.

Subscribed and sworn to before me this 26th day of July, A. D. 1912.

[Notarial Seal] HENRY BRICKLEY,
Notary Public in and for the County of Merced, State of California.

[Endorsed]: Filed July 26th, 1912. P. J. Thornton, Clerk. [14]

In the Superior Court of the State of California in and for the County of Merced.

No. ——.

G. E. NORDGREN, as Administrator of the Estate of PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX (a Corporation),

Defendant.

Demurrer.

Comes now Miller & Lux Incorporated (a Corporation), defendant in the above-entitled action, and demurs to plaintiff's complaint on file herein on the following grounds:

I.

Said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is uncertain in the following particulars and for the following reasons, to wit:

1. That it does not appear therein and cannot be ascertained therefrom how plaintiff was injured by the carelessness or negligence of defendant.

2. That it does not appear therein and cannot be ascertained therefrom how or in what manner defendant caused and permitted one Twining to frighten the harvester team in said complaint referred to. **[15]**

3. That it does not appear therein and cannot be

ascertained therefrom how or in what manner said Twining caused said team to become frightened and to run away.

4. In that it does not appear therein and cannot be ascertained therefrom what was the nature of the great and violent injury sustained by Peter Spino referred to in said complaint.

5. In that it does not appear therein and cannot be ascertained therefrom what was the nature of the work at which said Spino was constantly employed as a laborer, or how he earned large sums of money as wages, or what is meant by "large sums of money," or what part of his earnings he contributed to the support of his wife and child.

II.

That said complaint is ambiguous for all the reasons hereinabove stated for which it is uncertain.

III.

That said complaint is unintelligible for all the reasons hereinabove stated for which it is uncertain.

WHEREFORE defendant prays that it be hence dismissed with its costs of suit.

EDWARD F. TREADWELL,
Attorney for Defendant. **[16]**

State of California,
City and County of San Francisco,—ss.

J. Leroy Nickel, being first duly sworn, deposes and say*d*: That he is an officer, to wit, the vice-president, of the demurrant above named and makes this affidavit in its behalf; that the foregoing demurrer is not interposed for delay.

J. LEROY NICKEL.

Subscribed and sworn to before me this 20th day of August, 1912.

[Seal] M. V. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

EDWARD F. TREADWELL,
Attorney for Defendant.

[Endorsed]: Filed Aug. 30, 1912. P. J. Thornton, Co. Clerk. **[17]**

State of California,
County of Merced,—ss.

I, P. J. Thornton, county clerk of the county of Merced, State of California, and ex-officio clerk of the Superior Court in and for said county, hereby certify the above and foregoing to be a full, true and correct copy of the record, and the whole thereof, in the above-entitled suit pending in said Superior Court, said record consisting of the complaint, petition for removal, bond on removal, notice of filing petition for removal, demurrer, and order of removal, all on file and of record in my office.

IN TESTIMONY WHEREOF I have hereunto set my hand and the seal of said court this 10th day of September, A. D. 1912.

[Seal] P. J. THORNTON,
County Clerk of Merced County and Ex-officio Clerk of the Superior Court of the State of California, in and for said Merced County.

[Endorsed]: No. 2653. In the Superior Court of the State of California, in and for the County of

Merced. G. E. Nordgren, as Administrator, etc., Plaintiff, vs Miller & Lux, a Corporation, Defendant. Certified Copy of Record. Edward F. Treadwell, Attorney-at-Law. 1323 Merchants Exchange Building, San Francisco, California. **[18]**

No. 42—Civil. U. S. District Court, Southern District of California, Northern Division. G. E. Nordgren, as Administrator, etc., vs. Miller & Lux, a Corp. Certified Transcript of Record on Removal from Superior Court of Merced County. Filed Sep., 14, 1912. Wm. M. Van Dyke, Clerk. By Murray C. White, Deputy Clerk. **[19]**

Note by Clerk, U. S. District Court [as to Copy of Transcript on Removal].

The complaint and demurrer are the only papers included in the foregoing copy of the certified transcript on removal to this court, being only papers enumerated in the praecipe for transcript of record on writ of error filed herein on behalf of the plaintiff in error. **[20]**

In the United States District Court in and for the Southern District of California, Southern Division.

G. E. NORDGREN, as Administrator of the Estate of PETER SPINO, Deceased.

Plaintiff,

vs.

MILLER & LUX, a Corporation,

Defendant.

Order of Substitution.

The stipulation of G. E. Nordgren, named hereinabove as plaintiff in the above-entitled action, and J. J. Griffin, Henry Brickley, and L. J. Schino, Esqs., at attorneys of record in said action, agreeing to the substitution of Saverio di Giovanni Petrocelli, the present administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, in the place and stead of said G. E. Nordgren as the party plaintiff in the above-entitled action, and agreeing also to the substitution of M. H. Farrar, and J. J. Dunne, Esqs., in the place and stead of said J. J. Griffin, Henry Brickley and L. J. Schino, Esqs., as attorneys for the plaintiff in said above-entitled action, having been duly filed in said cause and court, and with the clerk of said court, and having been duly considered by said Court:

NOW, THEREFORE, in accordance with said stipulation, it is hereby ordered that Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter **[21]** Spino, deceased, be, and he is hereby substituted as the party plaintiff in the above-entitled action in the place and stead of G. E. Nordgren the above-named plaintiff; and that M. H. Farrar and J. J. Dunne, Esqs., be and they are hereby substituted as attorneys of record for the party plaintiff in the above-entitled action, in the place and stead of J. J. Griffin, Henry Brickley and L. J. Schino, Esqs.

Dated, March 3d, 1913.

OLIN WELLBORN,
Judge of Said Court.

[Endorsed]: 42—Civil. United States District Court in and for the Southern District of California, Northern Division. G. E. Nordgren, as Administrator of the Estate of Peter Spino, Deceased, Plaintiff, vs. Miller & Lux, a Corporation, Defendant. Order of Substitution. Filed March 3, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. **[22]**

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO di GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA (Sometimes Known as PETER SPINO), Deceased,

Plaintiff,

vs.

MILLER & LUX, a Corporation,

Defendant.

Stipulation [that Demurrer may be Sustained, etc.].

In the above-entitled action it is hereby stipulated and agreed, that the demurrer heretofore interposed by the above-named defendant to the complaint in said action may be sustained; and that Saverio di Giovanni Petrocelli, administrator of the Estate of Pietro Spina, sometimes known as Peter Spino,

deceased, heretofore substituted as the party plaintiff in the above-entitled action in the place and stead of "G. E. Nordgren," as administrator of "the estate of Peter Spino, deceased," and now plaintiff in said action, may have twenty (20) days from and after notice of the entry of the order of said court sustaining said demurrer pursuant to this stipulation within which to prepare, serve and file an amended complaint in the above-entitled action. **[23]**

Dated April 30th, 1913.

EDWARD F. TREADWELL,
Attorney for said Defendant.
J. J. DUNNE,
MERCER H. FARRAR,
Attorneys for Saverio di Giovanni Petrocelli, Adminstrator of the Estate of Pietro Spina, Sometimes known as Peter Spino, Deceased, Plaintiff in Above-entitled Action.

Order [Sustaining Demurrer, etc.].

Upon reading and filing the foregoing stipulation, it is hereby ordered that the demurrer of the above-named defendant to the complaint now on file in the above-entitled action, be and the same is, hereby sustained, with leave to Saverio di Giovanni Petrocelli, administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, the present plaintiff in said action, to prepare, serve and file an amended complaint in said action, within twenty (20) days from and after service of notice of the entry of this order.

Dated May 5th, A. D., 1913.

OLIN WELLBORN,
Judge of said Court.

No. 42—Civil. United States District Court in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, as Administrator of the Estate of Pietro Spino (Sometimes Known as Peter Spino), Deceased, Plaintiff, vs. Miller & Lux, a Corporation. Defendant. Stipulation and Order. Filed May 5, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. **[24]**

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO di GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED, a Corporation,

Defendant.

Amended Complaint.

Now come the above-named plaintiff, and by leave of Court first had and obtained makes and files this amended complaint in the above-entitled action, and for cause of action herein against the above-named

defendant, alleges and shows as follows:

I.

During all the times herein mentioned, the above-named defendant was, and still is, a corporation, organized according to plaintiff's best knowledge, information and belief, under and pursuant to the laws of the State of Nevada, and acting and doing business in said State of Nevada and in the State of California, and having and maintaining offices and places of business in said States of Nevada and California.

II.

That on or about the first day of July, A. D. 1912, upon [25] premises owned, occupied, controlled and operated by said defendant in the county of Merced, in the State of California, the above-named Pietro Spina, sometimes known as Peter Spino, died; and that thereafter, by due and proper proceedings had in the matter of the estate of said Pietro Spina, sometimes known as Peter Spino, deceased, in and before the Superior Court of the State of California, in and for the county of Merced, the above-named Saverio di Giovanni Petrocelli was, by an order of said Superior Court duly given, made and entered on February 17th, 1913, in the matter of said estate, duly appointed administrator of the said estate of said deceased: that thereupon, on said 17th day of February, 1913, said Saverio di Giovanni Petrocelli duly qualified as such administrator in manner and form as required by law, and letters of administration of and in said estate were duly issued to him; and that, ever since

said 17th day of February, 1913, said Saverio di Giovanni Petrocelli has been, and he still is, the duly appointed, qualified and acting administrator of the estate of the aforesaid Pietro Spina, sometimes known as Peter Spino, deceased.

III.

This plaintiff further shows that, at said time of his said death, said Pietro Spina, sometimes known as Peter Spino, deceased, and hereinafter referred to as the decedent, was of the age of about 35 years, was a married man, and left him surviving as his sole heirs at law his wife, named Giuditta di Giovanni Petrocelli Spina, aged about 35 years, and his daughter, named Assunta Spina, aged about 6 years, both of whom were, and still are, residents of the Kingdom of Italy; that for a long time prior to and at his said death, said decedent had been a farm laborer by occupation, and had no other source of income except [26] the wages earned by him in his said occupation; that during all of said times, prior to and at his said death, the aforesaid wife and daughter of said decedent were, and each of them was, dependent upon said decedent and his said earnings for their, and each of their, maintenance and support; that during all of said times prior to and at his said death, said decedent was without independent means or fortune, and was dependent for his support and maintenance and the support and maintenance of his said wife and daughter, upon his said wages earned in his said occupation of laborer; and in this behalf, this plaintiff shows that the average wages and earnings of

said decedent as such laborer aforesaid, for a long time prior to and at said first day of July, 1912, were the sum and amount of one hundred dollars, in lawful money of the United States, for each and every calendar month; and in this behalf, this plaintiff further shows that, for a long time prior to his said death, said decedent contributed to the support and maintenance of his said wife and child the sum and amount of about fifty dollars for each and every calendar month, out of and from his aforesaid wages and earnings, and that, by reason of his said death as aforesaid, his said wife and daughter have been, and are still, deprived of said support and maintenance, to their, and each of their, great injury and damage.

IV.

This plaintiff further shows that on the first day of July, 1912, at Midway Camp or Ranch, in the county of Merced, in the State of California, by, through and in direct and immediate consequence of the carelessness and negligence of said defendant, said decedent came to his death; and in this behalf, this plaintiff avers and sets forth the fact constituting said carelessness and negligence of said defendant as follows: [27]

Prior to and on said first day of July, 1912, said defendant, owned, occupied, controlled and operated said Midway Camp or Ranch, and was engaged in harvesting a crop thereon; during said time, and on said first day of July, 1912, said decedent was employed by said defendant to drive, and was then and there actually engaged in driving for said de-

fendant, a certain harvester team composed of about 32 mules, and then and there used in the aforesaid harvesting of the aforesaid crop; during said times, and on said first day of July, 1912, one Twining was employed by said defendant to follow and attend said harvester and count and record the sacks as they came from said harvester, and on said first day of July, 1912, said Twining was actually engaged in his said employment, and, for the purpose of enabling said Twining to perform the duties of his said employment, said defendant furnished him with a horse for use in that regard; said horse, so furnished as aforesaid by said defendant to said Twining, was then and there, to the knowledge of said defendant, a restive, fractious, vicious, frisky animal, not easily controlled, liable to run away, and a dangerous animal with which to approach said harvester team because of its frightening said mules; that on said first day of July, 1912, said defendant carelessly and negligently caused and permittted said Twining, for the purpose of counting and recording said sacks, to approach, and said Twining did approach, said harvester team with said dangerous and frightening horse aforesaid then and there entrusted to him by said defendant as aforesaid, without any effort to manage, restrain, control or quiet said horse, and failed and neglected to take any precautions in the *car* and driving of said horse to avoid the frightening of said harvester [28] team; that by reason of said carelessness and negligence of said defendant, said dangerous and frightening horse aforesaid did then and

and there frighten said harvester team which, as above alleged, said decedent was then and there driving, and cause said harvester team to run away, whereby said decedent was violently thrown and precipitated from the seat on which he was riding to the ground, and run over and killed by said harvester, which was then and there being propelled by said frightened team of mules.

V.

That the aforesaid death of said decedent was caused and brought about wholly by reason of the aforesaid carelessness and negligence of defendant; and in particular by the carelessness and negligence of defendant in failing and neglecting to take reasonable and proper precautions to protect said decedent; and in particular, by the carelessness and negligence of defendant in failing and neglecting to supply and provide proper, adequate and safe appliances and instrumentalities for the conduct of its operations; and in particular, by the carelessness and negligence of defendant in failing and neglecting to provide said decedent with a safe place of work; and in particular, by the carelessness and negligence of defendant in causing and permitting said Twining to use said dangerous and frightening horse; and in particular, by the carelessness and negligence of defendant in failing and neglecting to provide said Twining with such a safe and gentle horse as would enable him to approach said harvester team without frightening it; and in this behalf, this plaintiff alleges and shows that said acts of said defendant set forth in this complaint con-

stitute and concurred in causing the wrong for which redress is sought herein; and [29] further alleges and shows that the cause of action herein is based upon each and all of said acts.

VI.

That by reason of the aforesaid carelessness and negligence of said defendant resulting in said death of said decedent as aforesaid, and by reason of all the premises herein, the aforesaid wife and minor daughter of said decedent have suffered and sustained damages in the sum and amount of twenty-five thousand ($25,000) dollars.

VII.

That this plaintiff prosecutes this action for and on behalf of the aforesaid wife and minor daughter of said decedent.

WHEREFORE, said plaintiff prays judgment against said defendant for the sum of twenty-five thousand ($25,000) dollars, and for his costs and disbursements herein properly expended.

MERCER H. FARRAR,
J. J. DUNNE,
Attorneys for Plaintiff. [30]

State of California,
County of Merced,—ss.

Saverio di Giovanni Petrocelli, being first duly sworn deposes and says, that he is the plaintiff named in the foregoing amended complaint; that he has heard read, and has had translated to him said amended complaint and knows the contents thereof; that said amended complaint is true of his own knowledge except as to the matters which are

therein stated upon information or belief; and that as to such matters, he believes it to be true.

X SAVERIO di GIOVANNI PETROCELLI.

Subscribed and sworn to before me this 14th day of July, A. D. 1913.

JAMES V. TOSCANO,
Notary Public in and for the County of Merced, State of California.

State of California,
County of Merced,—ss.

On this 14th day of July, in the year one thousand, nine hundred and thirteen, A. D. before me, James V. Toscano, a notary public in and for said county, residing therein, duly commissioned and sworn, personally appeared Saverio di Giovanni Petrocelli personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] JAMES V. TOSCANO,
Notary Public in and for the County of Merced, State of California. [31]

Receipt of a copy of the foregoing Amended Complaint is hereby admitted, this 16th day of July, 1913.

EDWARD F. TREADWELL,
Attorney for the Defendant, Miller & Lux Incorporated, a Corporation.

[Endorsed]: No. 42—Civil. United States District Court, in and for the Southern District of Cal-

ifornia, Northern Division. Saverio di Giovanni Petrocelli, Plaintiff, vs. Miller & Lux, Incorporated, a Corporation, Defendant. Amended Complaint. Filed Jul. 17, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. M. H. Farrar and J. J. Dunne, Attorneys for Plaintiff. San Francisco. [32]

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO di GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA (Sometimes Known as PETER SPINO), Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corporation),

Defendant.

Answer.

Now comes the defendant above named and answering the complaint of plaintiff admits, alleges and denies as follows:

I.

1. It has no information or belief sufficient to enable it to answer the allegations of paragraph two (II) of said complaint, and placing its denial on that ground it denies that by due or proper proceedings in the matter of the estate of Pietro Spina

(sometimes known as Peter Spino), deceased, in the Superior Court of the State of California, in and for the county of Merced, said plaintiff, by an order of said Superior Court, duly given, made and entered, was appointed administrator of the estate of said decedent, and denies that he qualified as such administrator in the manner and form required by law, or that letters of administration were duly or otherwise issued to him, or that he has been or still is the duly appointed, qualified or acting administrator of the estate of said decedent. [33]

2. It has no information or belief sufficient to enable it to answer the allegations of paragraph three (III) of said complaint, and placing its denial on that ground it denies that at the time of his death the said Spino was of the age of thirty-five years, was a married man, or left him surviving as his sole heirs at law his wife and daughter named in said complaint, or either of them; denies that during all of said times prior to his death the wife or daughter of said decedent were or that each of them was dependent upon said decedent, or his earnings, for their or each of their maintenance or support; denies that the average wages and earnings of said decedent for a long time prior to or at the first day of July, 1912, exceeded the sum of sixty (60) dollars per month; denies that said decedent contributed to the support and maintenance of his wife and child in the sum of fifty (50) dollars for each or every month; denies that by reason of his death his wife or daughter have been or are deprived of his support or maintenance, to their or

each of their injury or damage.

3. It denies that decedent came to his death by, through or in direct or immediate or other consequence of the carlessness and negligence or carelessness or negligence of the defendant; denies that the horse mentioned in said complaint was then or there to the knowledge of said defendant, or otherwise, a restive, fractious, vicious or frisky animal, or not easily controlled or liable to run away, or a dangerous animal with which to approach said harvester team because of its frightening the mules attached to the same, or any other reason, or at all; denies that defendant carelessly or negligently caused or permitted said Twining to approach or that said Twining did approach [34] said harvester team with said or any dangerous or frightening horse then or there entrusted to him by defendant, or otherwise, or without any effort to manage, restrain, control or quiet said horse, and denies that said Twining or defendant failed or neglected to take any precautions in the care or driving of said horse to avoid the frightening of said harvester team; and denies that by reason of said or any carelessness or negligence of said defendant said or any dangerous or frightening horse did then and there, or otherwise, frighten said harvester team, or cause said harvester team to run away, and denies that by reason of any carelessness or negligence of defendant said harvester team did run away or whereby said decedent was violently or otherwise thrown or precipitated from the seat on which he was riding to the ground, or run over or killed by said harvester, but in the contrary the said

defendant alleges that said team ran away and the said decedent was thrown and killed without any carelessness or negligence by the said defendant of any kind or character whatsoever.

4. Said defendant denies that the death of said decedent was caused or brought about wholly or at all by reason of the aforesaid or any carelessness or negligence of defendant, or by the carelessness or negligence of defendant in failing or neglecting to take reasonable or proper precautions to protect said decedent, or by the carelessness or negligence of defendant in failing or neglecting to provide proper, adequate or safe appliances and instrumentalities for the conduct of its operations or by the carelessness or negligence of defendant in failing or neglecting to provide the said decedent with a safe place of work, or by the carelessness or negligence of defendant in causing or permitting said Twining to use said dangerous or frightening [35] horse, or by the carelessness or negligence of defendant in failing and neglecting to provide said Twining with such a safe or gentle horse as would enable him to approach said harvester team without frightening it; and denies that any acts of defendant constitute or concurred in causing any wrong to said decedent, and denies that any cause of action by the said plaintiff is based upon each or all or any of said acts.

5. Denies that by reason of the aforesaid carelessness or negligence of said defendant the wife and minor daughter, or wife or minor daughter of said decedent, have suffered and sustained, or suffered or sustained, damages in the sum of twenty-five thou-

sand dollars ($25,000), or any other sum.

6. Denies that the plaintiff prosecutes this action for or in behalf of the aforesaid wife or minor daughter of said decedent.

II.

As a further, separate and distinct defense to the said action said defendant alleges:

1. That the said decedent was brought to his death by reason of acts of negligence of the said decedent which contributed to and were the direct cause thereof, and in this behalf the defendant alleges that said decedent took no proper care or precaution to control the said team, or to prevent the same from running in case it should be frightened from any cause; nor did he take any proper care to hold himself on the said seat of said harvester when the said team ran as aforesaid, but on the contrary negligently and carelessly lost control of the said team and negligently and carelessly dropped or fell from the said harvester, and by reason of the said negligence and carelessness [36] of the said decedent received the injuries which caused his death, as aforesaid.

WHEREFORE defendant prays that plaintiff take nothing by his said action, and that it be hence dismissed with its costs.

EDWARD F. TREADWELL,
Attorney for Defendant.

State of California,
City and County of San Francisco,—ss.

David Brown, being first duly sworn, deposes and says: that he is the secretary of the defendant in the above-entitled action and makes this verification

in its behalf; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

DAVID BROWN.

Subscribed and sworn to before me this 26th day of July, 1915.

[Seal] JAMES MASON,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 42—Civil. In the United States District Court, in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, as Administrator, etc., Plaintiff, vs. Miller & Lux, Incorporated, Defendants. Answer. Received a copy of the within this 26th day of July, 1913. M. H. Farrar and J. J. Dunne, Attorneys for Plaintiff. Filed Jul. 28, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Edward F. Treadwell, Attorney-at-Law, 1323 Merchants Exchange Building, San Francisco, California. [37]

[Verdict.]

In the District Court of the United States, in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO DI GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INC., a Corporation,

Defendant.

We, the jury in the above-entitled case, find in favor of the plaintiff and against the defendant, and assess the damages in the sum of $5,000.

Fresno, California, May 18, 1915.

J. A. LANE,
Foreman.

[Endorsed): 42—Civ. U. S. Dist. Court, So. Dist. Cal. No. Div. S. de G. Petrocelli, as Adm'r, etc., vs. Miller & Lux, Inc. Verdict. Filed May 18, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [38]

In the District Court of the United States, in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO DI GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INC., a Corporation,

Defendant.

Judgment.

This cause coming on regularly on Monday, the 17th day of May, 1915, being a day in the May term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, to be tried by the Court and a jury to be duly impaneled; Mercer H. Farrar, Esq., and J. J. Dunne, Esq., appearing as counsel for plaintiff; Edward F. Treadwell, Esq., and Frank H. Short, Esq., appearing as counsel for defendant; and a jury of twelve (12) men having been duly impaneled herein; and the trial having been proceeded with on said 17th day of May, and on the following 18th day of May, 1915; and oral and documentary evidence having been introduced on behalf of the respective parties; and said cause having been argued to the jury by respective counsel and submitted to the jury, for their consideration, under the instruc-

tions of the Court; and the jury having, on said 18th day of May, 1915, rendered the following verdict: [39]

"*In the District Court of the United States, in and for the Southern District of California, Northern Division.*

SAVERIO di GIOVANNI PETROCELLI, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, Plaintiff, vs. Miller & Lux, Inc., a Corporation, defendant. No. 42—Civil. We, the jury in the above-entitled case, find in favor of the plaintiff and against the defendant, and assess the damages in the sum of $5,000. Fresno, California, May 18, 1915. J. A. Lane, Foreman," and the Court having ordered that judgment in accordance with the verdict of the jury be entered herein;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, plaintiff herein, do have and recover of and from Miller & Lux, Inc., a Corporation, defendant herein, the sum of five thousand dollars ($5,000), together with his ,said plaintiff's costs herein, taxed at $——.

Judgment entered May 18, 1915.

WM. M. VAN DYKE,
Clerk.
By Leslie S. Colyer,
Deputy Clerk.

[40]

[Endorsed]: No. 42—Civil. United States District Court, Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, as administrator, etc., vs. Miller & Lux, Inc. Copy of Judgment. Filed May 29, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. **[40]**

[Endorsed]: No. 42—Civil. In the District Court of the United States for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, as Adm'r, etc., vs. Miller & Lux, Inc., a Corp. Judgment-roll. Filed May 29th, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk.

Recorded Judg. Register, Book No. 1, page 110. **[41]**

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42 (CIVIL).

SAVERIO di GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, Incorporated (a Corporation),

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on for trial on the 7th day of May, 1914,

before the Court, Hon. Edward S. Farrington presiding, and a jury, and resulted in a verdict in favor of plaintiff for the sum of five thousand (5,000) dollars; that thereafter, the defendant duly made a motion for a new trial; and said Court thereafter made its order setting aside the verdict and granting a new trial of said action.

Thereafter, and on the 17th day of May, 1915, the said cause came on regularly for trial before the Court, Hon. Oscar A. Trippet presiding, and a jury, Messrs. J. J. Dunne and Mercer H. Farrar appearing for the plaintiff and Messrs. Edward F. Treadwell and Frank H. Short appearing for the defendant, and a jury having been duly impaneled, the following proceedings took place:

By consent of said defendant, plaintiff read in evidence the testimony of G. Albano, a witness on behalf of the plaintiff at the former trial, which was as follows: [42]

[Testimony of G. Albano, at Former Trial, for Plaintiff.]

I am a farm laborer. During the months of June and July, 1912, I was employed at Midway Camp by Miller & Lux. I knew Pietro Spina, or Peter Spino, in his lifetime. I was working on a harvester machine on the 1st of July, 1912, at the Miller & Lux ranch. Bill Trainor was working with me and Salapi, and Mr. Knight. Mr. Knight was the boss of the machine. Pietro Spina was driving the mule team attached to the harvester, consisting of thirty-two mules. I was on the harvester on July 1st, 1912, when Peter Spino was killed. I do not know Twi-

(Testimony of G. Albano.)

ning, but just before Peter Spino was killed I see a boy with a horse and cart. When I first saw the boy with the horse and cart he was pretty close to the machine. I was sack-tender and was on the left side. The horse and cart was also on the left side of the harvester going the same direction as the harvester. At that time it was running pretty fast. The boy in the cart was counting the sacks. At the time when the horse and cart were going pretty fast the boy was holding the horse.

Q. Show us how he was holding the horse, how were his arms, describe his arms?

A. He was holding the horse pretty strong.

Q. Show us what position his arms were in at that time? A. (Witness illustrates.)

Mr. DUNNE.—I would like the reporter's notes to show that the witness extended his arms full length.

The next thing that happened this man died. He fell down on the ground and he died. When the little cart was passing by the mules it scared them and they turned around and the man fell down on the ground from the seat. He was on the driving seat of the harvester. When the mules got scared in that way they started to run away. When they run away they turned around to the right. They went near a ditch or canal where they [43] got tangled up and they stopped. When they stopped I went to the dead body of Pietro Spina. I found it back of the machine a little bit off.

(Testimony of G. Albano.)

Cross-examination.

I seen that boy in the cart when he first came up to the harvester. He came up to get the number of sacks. Mr. Trainor got off the harvester and went out to the cart to give him the number of sacks. Mr. Trainor was not at the cart when the horse that was on the cart began to run away. He was on the ground quite a ways off from the cart. He went up to the cart after he got off of the harvester. The boy was in the cart all the time. I did not notice when the horse and cart first began to run,—not when they started. After the horse started to run the mule team started to run away also. I don't know, I cannot say how far they ran. I don't know if they went a hundred yards. Spino fell down. There was a high check there. The harvester went over a check or levee and that is where Spino went off. The lines were in Pietro Spino's hands. He had them in the seat. There was one around, tangled on his foot. I know what is called the ladder up to the seat. The line was dragging him along. I seen him when he fell down from the seat to the ground and he had the lines tangled up about his foot. I could see the seat from where I was.

[Testimony of Orison Knight, for Plaintiff.]

ORISON KNIGHT, a witness called on behalf of plaintiff, testified as follows:

I am a laborer. I work through the harvest, run the machine and so on. I have been engaged in farming operations for about twenty years or more. During that time have been employed principally by

(Testimony of Orison Knight.)

Miller & Lux, and am in the employ of Miller & Lux now, and was in June and July, 1912, at Los Banos, in Merced County, running the harvester. It was on Midway Camp [44] where I started up. In the course of my experience in farming I have had experience with horses and mules for thirty or thirty-five years, driving them, breaking them, and all kinds of experience. Am acquainted with the habits and manners of such animals. From my experience in that respect a mule team is easily frightened; a mule team frequently runs away. The general characteristics of mule teams are known to persons engaged in farming operations. A harvester, when in operation, makes a regular noise. That regular usual noise of a harvester does not frighten the mule team; a sudden noise will. A sudden noise that they are not accustomed to will frighten them. If a mule team is approached from behind by another animal, that will have a tendency to frighten the mule team. If the animal that approaches the mule team from behind is going at a high rate of speed, going rapidly, that will frighten the mule team. A mule team will be frightened by one who drives up to it in a heedless way. My experience covers not only mules but horses. When horses start to run they don't know when to quit. I have driven them, broken them, and used them in various ways. I recollect the boy named Twining. I met him two or three times. I was not well acquainted with him. I have seen this boy out in the field, where this harvester was working at Midway Camp, a couple of times. I think he was about

(Testimony of Orison Knight.)

eighteen or twenty years of age. I did not pay much attention to him.

Five men were employed on the harvester including myself. I was foreman, Peter Spina was driver, Albano was sack-tender, Salapi was header tender, and Trainor was sack-sewer. The sack-sewer is on the left-hand side, about two feet from the ground. There is a platform at the front end. I recollect the day when Spina was killed. Salapi had been working about a month before that. Spina was the driver; he faced the mules, with his back toward the machine. Spino, the driver, had worked on that harvester for about a month before the day of the death **[45]** mentioned here. I was in charge of the harvester as foreman. Spina was earning in that capacity three dollars a day and his board, working twenty-six days a month. On the 27th of June, 1912, three days before Spina died, I saw this boy Twining. I saw him coming through the field up to the harvester. This was three days before Spina's death.

"Q. Now, on that day three days before Spina's death, what, if anything, did Twining do on that day with his horse?"

To which question the defendant duly excepted as being entirely irrelevant, incompetent and immaterial, being three days before the accident, and on the further ground that they should first show how this happened and whether there is any possible materiality in what took place before, which objection was overruled, to which ruling defendant duly excepted.

He came out to the machine. He was driving

(Testimony of Orison Knight.)

a brown horse. He got out of the cart and *and* got in where the sack-sewer was and I was on top of the machine, and I looked up and saw his cart going around the team, and mules started to run and I grabbed the brake and stopped them. When he got out of his cart on that occasion he let his horse go. The horse went up alongside the mules and then they started to run when I got to the brake and stopped them.

"Q. Now, when that transaction occurred, did you say anything to Twining? A. I did.

"Q. What did you say to Twining at that time?"

To which question defendant objected on the ground that it is hearsay and not binding on the defendant, and particularly that until it is shown that on the day of this accident Twining was doing the same thing that he did at that time, namely, letting his horse wander around, it is entirely irrelevant and immaterial to any issue in this case. Which objection *we* Court overruled, [46] to which ruling the defendant duly excepted.

When I stopped the team I got up on the machine where he would see me and I said: "You take care of that horse or stay out of the fiield; that he might cause a runaway, and kill somebody, or some of the mules tear up the machine." When I said that to Twining I never heard him make any reply. He got in his cart and drove off. Three days later, on the first of July, 1912, I started out about six o'clock from the ranch. Spina was killed about half-past nine. I saw the boy Twining approach the har-

(Testimony of Orison Knight.)

vester that morning. When I first saw him he was probably a quarter of a mile away coming from the south. The harvester was going west. The boy Twining was approaching the harvester from the south on that occasion, between a galop and a run. As he came up from the south and came on toward the harvester he was twisting around some, and when he got up closer to the harvester he whirled around a couple of times, and then drove up in front of the machine where the sack-sewer was. This was a different horse from the one he was driving on June 27th.

"Q. Now, you observed that horse as he was driving it on that occasion, and I will ask you what manner of horse that was in your opinion. State your opinion as to the character of that horse."

To which question defendant objected, as being incompetent, irrelevant and immaterial, and calling for the conclusion of the witness, and no foundation laid for it. Objection overruled by the Court, to which ruling the defendant duly excepted.

"A. Well, in my opinion it was a high-lifed, small horse. One that needs attention. In my opinion it was a spirited animal. The reasons I have in mind for this opinion are the way the horse ran through the field and run around the machine after he got him up there. He was running through the field, and I seen him running over the checks, and I could tell he was coming pretty fast. **[47]** He did not pursue a straight line. He was turning coming around, kind of twisting zigzag. The cart

(Testimony of Orison Knight.)

was a medium cart without any brakes. Had two wheels, and no dashboard. There was no one else in the cart except Twining. When I saw him approaching in the way I have described through the field approaching the harvester I went down to the brake on the harvester. The mule team was all right and was going a slow walk. At the time Twining's horse and cart got alongside the harvester, when the harvester was going west, and the horse walking, Twining's horse was walking. When the mule team was walking and Twining's horse was walking the distance between the harvester and the cart was probably twenty feet. When he got alongside the harvester in the position and under the circumstances I have described, I thought everything was all right and I saw a check and I went down to the brake. When I got down to the brake at that time, I could not see Twining or Trainor, my view was obstructed by the cleaner.

I left the farmhouse that morning to go to work at six o'clock, and this accident happened about half-past nine. The harvester got in motion about seven o'clock, and between seven and nine the harvester crossed several checks, and on those occasions there was no runaway. A check is a slight elevation in the ground to hold the water. Probably two feet high, a foot and a half, some higher and some lower, depending on the formation of the ground. They slope up and down, a gentle slope. When the harvester was nearing this check and I was at the brake the mules started to run. At that time when the

(Testimony of Orison Knight.)

mules started to run I saw Twining. He was running right alongside the mules; his horse was going pretty fast. So far as my observation of the facts occurring there on that occasion permits, the harvester did not start Twining's horse to run, nor did the mules themselves so far as my observation went start Twining's horse to run. [48] I did not see any member of the harvester do any act to start Twining's horse or the mules. After I lost sight of Twining and went behind the cleaner the next time I saw him the horse was alongside the mules and going pretty fast, 14 or 16 feet away from the mule team, running west. The mules were running west also and run probably a hundred yards. They then turned to the right, turned right short, and run down through the grain field, probably a couple of hundred yards, and run into a ditch of water and turned to the left. I jumped off and run ahead of them and stopped them. I did not see Spina after the sharp turn to the right. I saw him just before the turn on the seat. After that I next saw Spina lying on the ground dead. The harvester was fitted with a bull wheel. I observed the track of the bull wheel on that occasion. Spina's body was lying right in the track. Twining got his horse turned about the time the mules turned. He went back the same way he came, south. He turned to the left. About the same time the mule team turned to the right. After turning to the left he went about a quarter of a mile. I saw him stop; he was stopped, looking back. That is the last I saw him. I saw him after that going

(Testimony of Orison Knight.)

through the field. He did not return to the scene. The nearest farmhouse to the scene of the occurrence is about two miles.

Cross-examination.

I was foreman of the crew. It was my duty to take charge all over the machine, watch everything, sometimes one thing and sometimes another. I was watching the brake. There was more than one brake on the machine. It was the duty of the sack-sewer to watch one brake and the driver to watch the other. [49] One of the brakes was my particular duty. Twining was going around for the purpose of getting the count of sacks that were being cut and harvested. Before the day of this accident, he had been there on at least one occasion, and got the count of the sacks. As to whether Twining had been there more than once before, I only remember of his having been out there twice; I remember his being there once before the runaway. The time he came there the first time he did not have the same horse that he did when he came the second time. The first time he came he drove up alongside the harvester, probably 8 or 10 steps away. He came from the rear of the machine. When he first came up and I seen him riding *along* the machine, he was in the cart. I did not see him get out of the cart on that occasion. I could not see him. I went down to the brake and saw his horse and cart going up around the leaders and I ran to the brake, when the team started up. The next thing I saw on that occasion was the horse and cart going along without anybody in it, up close

(Testimony of Orison Knight.)

to the mule team, and the mule team started. The horse was wandering around near the mules, and he was not in the cart at that time. I suppose he was in the doghouse, where the sack-sewer was; that would be where he would go to get the count of the sacks. That was when I told him that he must either take care of his horse or stay out of the field. He was not taking care of his horse at that time. His horse was walking along without anybody in the cart at all. It is not unusual at all for a buggy or a cart to drive up along the harvester while it is in operation from behind; they keep out of sight of the mules. The noise that would be ordinarily made by driving a horse and cart in an ordinary way up to the side of or from the rear of [50] the harvester, over the ground, would be pretty nearly, if not entirely, killed by the noise of the machine itself. It is not an extraordinary or unusual thing at all to drive a cart up alongside of the machine for the purpose of getting the count of sacks or for any other purpose. That is done, the foreman will come up or a boy getting sacks, as a general thing, wherever harvesting is being done.

On the second occasion I saw Mr. Twining after he arrived at the harvester in the cart. He was probably twenty feet off from the harvester. He came in right to the back of the machine and made a couple of circles, and pulled up alongside. He came in, not to the back of the machine; he came from the south to the back of the machine. The machine was going west. He came in on a sort of angle, made a couple

(Testimony of Orison Knight.)

of circles, close to the back of the machine and went in alongside. The harvester was moving at that time. The mules were going at a slow walk. When he came alongside there at the place where I saw him his horse was walking; his horse was walking the last I saw of him. I first went to the brake when he was making those circles around the machine when he came up. I was at the brake by the time he got walking alongside of it. I looked to see where he was and I saw him right alongside the machine, and I thought everything was all right. I thought there was no danger of any kind, and went back to the back of the machine and left the brake temporarily and thought it was perfectly safe to do so. I never had the horse that Twining was driving, never used it. I don't know whether I had ever seen it before. I don't remember, I know nothing about the horse whatever. All I knew **[51]** of my own knowledge about the horse was what I saw on that morning.

Spina had been working about a month on the harvester and before that he was running an excavator. During harvesting we pay men that drive a harvester more than an ordinary farm laborer gets. He got three dollars a day during the harvesting, and thirty dollars a month and keep other times. The harvesting generally lasts 80 to 90 days. Some of the checks are a couple of feet, and some of three *three* feet high. This check was about a couple of feet; it was rounded off. They are pretty well over the fields, and it is usual to run a harvester right over them. Spina had been driving this team over them for a month.

(Testimony of Orison Knight.)

The cart is arranged to put the feet in the bottom of the cart on a slant in front of the driver. It is a form of cart that is very frequently used in that country. It is not customary to have what is generally called a dashboard on a cart.

When Mr. Twining approached I went to the brake. It is the usual thing I do when anybody approaches the harvester. There was nothing unusual in that at all. I saw Twining after he quieted his horse down. I was not able to see him all the time from the time he came over and got his horse quieted down until I afterwards saw the horse running away. There was a part of the time when I was on the opposite side of the machine, and therefore could not see Mr. Twining on the cart. In fact, that was the condition of things when his horse started to run. Mr. Twining's horse had run about midway of the team when I first saw it, when the team was running. His horse ran about two hundred yards before he got control of it. As the team ran they turned to the [52] right. As Twining's horse run it turned somewhat to the left, so that they were converging or getting away from each other as they run. Before he got control of his horse he ran probably one hundred and fifty or two hundred yards. I don't know how much farther, that is the last I noticed it. To prevent runaways or control the teams in case of a runaway we throw the brakes on. There was one brake that I handled and there was another brake that the sack-sewer handled, and the driver had a brake also. He also has the lines to control the direction of the

(Testimony of Orison Knight.)

mules. In this case the mules changed their direction after they had run about 100 yards, and the next that I knew Spina was off his seat and down on the ground. I don't know whether he fell or jumped off, or how he got off. I did not see Mr. Twining or his horse at the time that it started to run, and I don't know what it was started Mr. Twining's horse to run. His horse started the team to run.

Redirect Examination.

The header-tender can see all around the field. The header-knife is run with a chain operated by the header-tender with a small wheel.

[Testimony of S. Salapi, for Plaintiff.]

S. SALAPI, a witness on behalf of plaintiff testified as follows:

I work with animals. I knew Pietro Spina in his lifetime. I remember the occasion when Spina was killed. I was working at Midway Camp where Spina was killed. I was employed on the harvester as header. I worked the header with a wheel. My position was on the high part of the harvester. If I chose [53] to look around, I could see in the neighborhood. I have had experience in handling mules and horses and have handled horses and mules in the old country, in Italy about five years, also in Brazil about fourteen years, and in California five years. On the day that Spina was killed, Knight, Trainor, Albano, Spina and myself were working on the harvester. Spina was driving the mule team sitting on a small seat. It was a small seat on top of

(Testimony of S. Salapi.)

the step ladder. We began working at six o'clock; Spina was killed at nine. Between six and nine the harvester passed over irrigating checks. In passing over those checks there was no runaway by the mule team. Shortly before Spina was killed I saw a boy in a cart come near the harvester. The boy was in a cart. It was a small cart. It had no brakes. It had two wheels. When I first saw the boy on that occasion in that cart he was about a quarter of a mile away back of the harvester. He was running, zigzagging before he gets there. When he got fairly close up to the harvester he turned his cart about twice around. He then got near the harvester. When he got near the harvester he was about five or six steps away. At that time when the boy was there alongside the harvester and five or six steps from it his horse was going slowly. The horse was walking.

"Q. Now, I wish you would tell me from your observation of that horse as you saw him there that morning, during the time that he was approaching the harvester, when he was going fast, as you said, making these zigzags and these two circles, down to the time you saw him walking, from what you saw of the horse that morning, I wish you would describe what kind of an animal in your opinion this horse was?"

To which question the defendant objected, on the ground that the [54] same was incompetent, irrelevant and immaterial and called for the conclusion of the witness, and no foundation laid for it; which objection the Court overruled, to which ruling the said defendant duly excepted.

(Testimony of S. Salapi.)

"A. The horse in my opinion was full of life."

"Q. When the horse was there alongside the harvester and was walking, as you have described it, how fast were the mules going at that time?

"The mules were walking also; both the mules and the horse and cart were walking straight in the same direction. At that time while those things were so, I saw Mr. Trainor; he jumps off the harvester. He moves about two steps near the cart. I see the boy in the cart at that time. He was looking to Billy Trainor. I saw that he was talking. I could not hear the words that they said, because the harvester was making a noise. The lines from the boy's horse were lying on top, loose, on top of the single-trees. He had the ends of the lines, the extreme ends, the tips, in his left hand. He was making motions to Billy Trainor with his right hand. His left hand that held the tips of the lines was laying on his left knee at the time he was making these motions to Trainor. While that was so the horse ran at once directly to the team. When the horse reached the mules and got alongside of the mules the mules ran away, right straight ahead. The horse runs alongside the team about seventy feet and then turns to the left. The mule team ran on the right side as far as the ditch. They were stopped there. When the boy's horse started to run I saw him get hold of the line with both hands and try to hold the horse. When the mules were running I left the header. [55]

I saw what became of Spina. He was thrown off

(Testimony of S. Salapi.)

at the time the mule team was turned on the right. When I left the header I went down a little bit, then I went to the steps again and I was going to go up to the seat. I went up there because I was trying to get hold of the lines. When I got part way up the steps I did not go the rest of the way. I could not help it, the line was dropped, fell down. When the mule team was stopped, I went back to the place where Spina was thrown off. See him there. He was dead. From my experience with mules when mules are approached from behind, from the rear, by another animal running, that would frighten the mule team. I had been working on the harvester twenty-two days before Spina was killed; during those twenty-two days, I saw Twining out there in the field near the harvester twice.

Cross-examination.

At the time this boy came up in the cart he came from behind and drove up on the left-hand side. I was on the right side. When working on the header, I turned around my face, almost all over, sideway and backway. I testified in this case at the time it was tried before.

"Q. You didn't say anything at that time about seeing him coming across the field a quarter a mile off, did you? A. Because nobody asked me.

"Q. You didn't testify anything at that time about how he was holding the lines, did you?

"A. I was not asked.

"Q. Didn't you testify the last time that the first time you saw Twining in the cart was when he was

(Testimony of S. Salapi.)

right alongside of the machine? [56]

"A. Nobody asked me, otherwise I would say so.

"Q. After Twining came up in the cart and his horse was walking alongside of the machine, how far did he walk along that way? How far did the horse and cart go along, walking?

A. About 20 or 30 steps. I got down off the header but I did not get entirely off of the machine on to the ground. I stopped half way down from the seat—from the header seat." The ladder goes right up over the horses, and I climbed out on that, a little more than half way. While the mule team was running. This was after Spina was thrown off the seat. I was going to go there to get hold of the lines. The line was still on the seat. Both of them were on the seat. The line got tangled around Spina's body.

Counsel for defendant thereupon read in evidence, as part of the cross-examination of the witness, his testimony at the former trial, which was as follows:

Mr. DUNNE.—Q. I will ask you, by permission of counsel, a leading question, if it is not a fact that on July 1st, 1912, you were employed on the harvester at the Midway Camp of Miller & Lux as a header-tender—I think that is the correct phrase?

A. Yes, sir.

Q. And you were employed there as header-tender? A. No, sir.

Q. What were you doing on the harvester?

A. I was tending the header.

Q. Tending to the header. Now, were you there at the time that Peter Spino was killed?

(Testimony of S. Salapi.)

A. Yes, sir. **[57]**

Q. Now, tell us plainly and clearly all that you saw of that matter.

A. I see—What I see, I see the cart coming pretty fast and we was there close to a big, high levee. Well, when this cart was going by, the mules started to run. Well, when the mules started to run, Pietro Spina fell down from the seat between the mules.

Q. And then?

A. And the line tied up his leg, and the mules dragging him along.

Q. And then?

A. I quit the knife of the header and I tried to go up on the seat, and there was some line on the seat, and Pete Spino was under the mule.

Q. Now, when you first saw this horse and cart where was it with reference to the harvester?

A. Well, five or six steps from the harvester.

Q. In what direction was it going at that time?

A. It was going the same direction of the harvester team.

Q. At what rate of speed, as nearly as you can describe it?

A. It was going pretty fast, but I can't tell how fast it was going.

Q. Did you notice the boy that was driving the horse and cart at that time? A. Yes, sir.

Q. What was his position in the cart at that time?

A. He was holding the horse all he could, but it run away.

Q. And when you first saw this horse and cart,

(Testimony of S. Salapi.)

state whether it was abreast of the harvester or abreast of the mule team. Just at the point of time when you first saw the horse and cart was it abreast of the harvester or abreast of the mule team —perhaps a simple word would be alongside—alongside the harvester or **[58]** alongside the mule team when you first saw them?

A. First when I saw it, it was near the harvester, and he passed by.

Q. From what direction did that horse and cart approach the mule team? From in front, so that the mules could see it coming, or from behind, so that the mules couldn't see it coming, which way?

A. It was behind the team, in back of the team.

Q. From behind the team. Now, when the mule team ran away, what direction did it go in?

A. They turned to the right-hand side.

Q. And then where did it go?

A. They went and stopped in a ditch, a drain ditch.

Cross-examination.

Mr. TREADWELL.—Q. Did you see the cart when it first came up to get the number of sacks?

A. I seen him when he passed by, they were trying to run away, running away.

Q. Which side of the harvester were you on?

A. I was on top.

Q. Were you on the right-hand side of the left-hand side? A. I was on the right-hand side.

Q. Did you see Mr. Trainor get off and go over to the cart to give him the number of sacks?

(Testimony of S. Salapi.)

A. Yes, sir.

Q. Was the cart stopped at that time?

A. No, sir, it didn't stop.

Q. Did you see Mr. Trainor go over to the cart?

A. I say that he was going towards the cart but he couldn't go because the horse started to run. **[59]**

Q. After the mule team stopped running, did you say you found the lines on the seat and Spino on the ground?

A. When they started to run, I left my position and I went up there to see if I could catch the line, to turn the team back. When I was there pretty near to get the line, it fell down, the line fell down.

Q. So you couldn't get the line because it fell down? A. No. I couldn't get there in time.

Q. Was that after Spina fell or where was Spina then?

A. When I went up there and tried to get the line, Mr. Spina was down at the foot of the mule, near the wheel."

Plaintiff thereupon offered in evidence the proceedings in the matter of the estate of Peter Spino, deceased in the Superior Court of the county of Merced, to which offer defendant objected, on the ground that it appears that the proceedings are in the estate of Peter Spino, whereas this man's name is Pietro Spina, which objection the Court overruled; to which ruling defendant duly excepted.

Said proceedings were received and read in evidence and consisted of the following:

[Plaintiff's Exhibit "A"—Petition.]

In the Superior Court of the State of California, in and for the County of Merced.

In the Matter of the Estate of PETER SPINO, Deceased.

PETITION.

To the Honorable, the Superior Court of the State of California, in and for the County of Merced:

The petition of G. E. Nordgren of said county and State respectfully represents: **[60]**

That Peter Spino died on or about the 1st day of July, 1912, at the county of Merced, State of California;

That said deceased at the time of his death was a resident of the county of Merced, State of California;

That said deceased left estate in the said county of Merced, State of California, consisting of certain personal property:

That the value and character of said property are unknown to your *petition,* but that said property consists entirely of personal property and does not exceed in value the sum of $500; that all of said personal property is the common property of said deceased and the widow of said deceased, who is a resident of the Kingdom of Italy and resides outside the State of California.

That the next of kin of said deceased, and whom your petitioner is advised and believes and therefore alleges to be the heirs at law of said deceased are a widow, aged 35 years, to wit, Jovetta Spino, resid-

ing in the Kingdom of Italy, and one minor child, to wit, Sunda Spino, residing with said widow in said Kingdom of Italy.

That due search and inquiry have been made to ascertain if said deceased left any will and testament but none has been found, and according to the best knowledge, information and belief of your petitioner said deceased died intestate.

That your petitioner is the public administrator of the county of Merced, State of California, and therefore as your petitioner is advised and believes is entitled to letters of administration of said deceased.

Wherefore, your petitioner prays that a day may be appointed for the hearing of this application; that due notice thereof be given by the clerk of said court by posting notices **[61]** according to law and that upon said hearing and the proofs to be adduced letters of administration of said estate may be issued to your petitioner.

G. E. NORDGREN,
Petitioner.

_____,
Attorney for Petitioner.

[Endorsed]: No. 892. Superior Court, County of Merced. In the Matter of the Estate of ~~William Jones,~~ Peter Spino, Deceased. Petition for Letters. Filed July 16, 1912. P. J. Thornton, Clerk. K. C. Ferguson, Deputy Clerk. Brickley & Schino, Merced, California, Attorneys for————.

In the Superior Court of the County of Merced, State of California.

In the Matter of the Estate of PETER SPINO, Deceased.

Notice of Posting of Application for Letters of Administration.

C. C. P., sec. 1373.

Notice is hereby given that G. E. Nordgren having filed in this court his petition praying for letters of administration upon the estate of Peter Spino, deceased, the hearing of the same has been fixed by the clerk of said court for Friday, the 26 day of July, A. D. 1912, at 10 o'clock A. M. of said day, at the courtroom thereof, at the city of Merced, in said county of Merced, and all persons interested in said estate are notified then and there to appear and show cause, if any they have, why the said petition should not be granted and Letters issued as prayed for.

July 16, 1912.

J. P. THORNTON,
Clerk.

By ————————————,
Deputy Clerk. **[62]**

[Endorsed]: No. 892. Superior Court, County of Merced. In the Matter of the Estate of Peter Spino, Deceased. Affidavit of Posting Notice. Filed July 22d, 1912. P. J. Thornton, Clerk.

State of California,
County of Merced,—ss.

P. J. Thornton, county clerk of the county aforesaid, being duly sworn, says that on the 16 day of

July, A. D. 19.. he posted three notices, of which the within is a true copy, in three different public places in the county of Merced, to wit: One at the place where the court is held, one at the ~~Post-office~~ Harris Bldg., Canal St. and one at the ~~Cosmopolitan Saloon,~~ corner of Sixteenth Street and Huffman Avenue, in the city of Merced, in said county.

P. J. THORNTON,

Subscribed and sworn to before me this 22d day of July A. D. 1912.

W. B. CROOP,
Justice of the Peace.

In the Superior Court of the County of Merced, State of California.

In the Matter of the Estate of PETER SPINO, Deceased.

Order Appointing Administrator.

The petition of G. E. Nordgren praying for letters of administration on the estate of Peter Spino, deceased, coming on regularly to be heard; and due proof having been made to the satisfaction of this court, that the clerk had given notice in **[63]** all respects according to law; and all and singular the law and the evidence being by the Court understood and fully considered. Whereupon it is by the Court here adjudged and decreed that the said Peter Spino died on the 1st day of July, A. D. 1912, intestate, in the county of Merced, that he was a resident of Merced County, Cal., at the time of his death, and that he left estate in the county of Merced, State of

Cal. and within the jurisdiction of this court.

IT IS ORDERED, that letters of administration of the estate of the said ~~C. E. Nordgren~~ Peter Spino, deceased, issue ~~to the said petitioner~~ issued to G. E. Nordgren ~~upon taking the oath and filing a bond according to law, in the sum of~~ dollars upon his tak ing the oath.

GEO. E. CHURCH,
Judge of the Superior Court.

Dated July 26th, A. D. 1912.

[Endorsed]: No. 892. Superior Court, County of Merced. In the Matter of the Estate of Peter Spino, Deceased. Order Appointing Administrator Filed July 26, A. D. 1912. P. J. Thornton, Clerk.

[Further Endorsed]: Recorded July 26, 1912, in book I, page 308, of Probate Minutes by K. C. Ferguson, Clerk.

In the Superior Court of the County of Merced, State of California.

In the Matter of the Estate of PETER SPINO, Deceased.

Letters of Administration.

State of California,
County of Merced,—ss.

G. E. Nordgren is hereby appointed administrator

of the **[64]** estate of Peter Spino, Deceased.

WITNESS: P. J. THORNTON,

Clerk of the Superior Court of the County of Merced, with the Seal Thereof Affixed, the 26th day of July, A. D. 1912.

By order of the Court.

P. J. THORNTON,
Clerk.
By K. C. Ferguson,
Deputy Clerk.

State of California,
County of Merced,—ss.

I, C. E. Nordgren do solemnly swear that I will faithfully perform, according to law, the duties of *administrat* of the estate of Peter Spino, deceased.

G. E. NORDGREN.

Subscribed and sworn to before me, this 26th day of July, A. D. 1912.

[Seal] P. J. THORNTON,
Clerk.
By K. C. Ferguson,
Deputy Clerk.

[Indorsed]: No. 892. Superior Court, County of Merced. In the Matter of the Estate of Peter Spino, deceased. Letters of Administration Issued to G. E. Nordgren, on the 26th day of July, A. D. 1912. Filed July 26, A. D. 1912. P. J. Thornton, Clerk.

In the Superior Court of the State of California, in and for the County of Merced.

In the Matter of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, deceased.

[65]

Petition for Revocation of Letters of Administration.

To the Honorable, the Superior Court of the State of California, in and for the County of Merced:

Now comes Saverio di Giovanni Petrocelli, of the county of Merced, State of California, and respectfully presents this his petition, showing:

I.

That Pietro Spina, sometimes known as Peter Spino, died on or about the first day of July, 1912, in said county of Merced, in the State of California.

II.

That said Pietro Spina, sometimes known as Peter Spino at the time of his death was a resident of said county and State, and left estate in said county and State, the exact character and probable value whereof this petititner does not known, and is not able to state.

III.

That the heirs at law of said deceased are as follows, to wit:

Names.	Relationship.	Residence.
Giuditta di Giovanni Petrocelli Spina,	Surviving widow of deceased.	Moliterno, Kingdom of Italy.
Assunta Spina,	Daughter of deceased.	Moliterno, Kingdom of Italy.

IV.

That on the 26th day of July, 1912, said Court made and gave its order appointing G. E. Nordgren, then and now the duly elected, qualified and acting public administrator of the county of Merced, State of California, as administrator of the estate of said deceased; that, in pursuance to said order, letters of **[66]** administration were issued to said G. E. Nordgren as such administrator; and that said G. E. Nordgren duly qualified and received said letters, and thereupon assumed the duties of such administrator and is now the administrator of, and administering said estate.

V.

That your petitioner is a competent person, and is a relative by blood of the surviving wife of said deceased, to wit, a brother, and is competent to act as and perform the duties of administrator of said estate of said deceased; and that said surviving wife of said deceased has, in writing, requested your petitioner, such competent person, to obtain the issuance of letters of administration upon said estate to him, the said petitioner, and to assume the duties of administrator of said estate, and to administer the same, and said request is contained and set forth in those two certain powers of attorney which are hereto attached, made a part hereof, hereby expressly referred to, and marked exhibit "A" and "B"; and in this behalf this petitioner shows that the original of said exhibit "A" is in the Italian language, and that said exhibit "A" i*f* a full, true and correct translation into English of said original; and

that the original of said exhibit "B" is in the English language.

WHEREFORE, your petitioner respectfully prays that the letters of administration heretofore issued to the said G. E. Nordgren be revoked, and that letters of administration upon the estate of said deceased be issued to your petitioner.

SAVERIO di GIOVANNI PETROCELLI,
Petitioner. **[67]**

J. J. DUNNE,
MERCER H. FARRAR,
Attorneys for said Petitioner.

State of California,
County of Merced,—ss.

Saverio di Giovanni Petrocelli, being first duly sworn, deposes and says: that he is the petitioner named in the foregoing petition; that said petition has been read and translated to him, and that he knows the contents thereof; that said petition he knows to be true of his own knowledge, except as to the matters therein stated on information or belief, and that as to such matters he believes it to be true.

SAVERIO di GIOVANNI PETROCELLI.

Subscribed and sworn to before me this 25th day of January, 1913.

[Seal] JAMES V. TOSCANO,
Notary Public in and for said County and State.

EXHIBIT "A"

L

D

VIGNETTE

D 2

Province of
Potenza

No. of Rep. Not. 347 Id. of Reg. 167.

Aumento
del Due
Per Cento [68]

Special Power of Attorney.

King Victor Emanuel III reigning by the Grace of God and the will of the Nation,

KING OF ITALY;

In the year one thousand nine hundred and twelve, 1912, this thirty-first, 31 of July, in Moliterno, in the house of Giuditta Petrocelli, at No. 9 Seggio Street; Before me, Giulia Gargia, (son) of the late Francesco, notary here residing and registered in the notarial office of the district of Lagonegro; and in the presence of Petrocelli Domenico, (son) of Saverio, cooper, and Melillo Domenico, (son) of Vincenzo, cooper, witnesses known, competent and requested, and born and domiciled in Moliterno

APPEARED

Giuditta di Giovanni Petrocelli, widow of Spina, housewife, born and domiciled in Moliterno, to me and to the witnesses known and qualified, who ap-

pears in her own name and as legal representative of her minor child, Assunta Spina, daughter of the late Pietro Spina; the aforesaid declares to me that on the first of the expiring month of July, in Los Banos, California, she had the misfortune to lose her husband, Pietro Spina, (son) of Saverio, born in Moliterno, who was mangled by a threshing machine upon which he was working; that the sad fact, besides having bereaved the one who here appears of her husband, and the daughter of her faither, has taken from them their only support and means of subsistence since they depended for their living solely upon the remittances which the deceased punctually sent to them. [69]

Now, since she cannot personally betake herself to a country so distant in order to liquidate the damages and indemnities that may belong to her, the aforesaid Giuditta Petrocelli, by this public act, nominates and constitutes as her special attorney in fact Mr. Saverio di Giovanni Petrocelli, residing in Los Banos, whom she empowers as attorney in fact to liquidate by amicable means or by judicial procedure before competent authorities, the damages and indemnities which are coming to her for the death of the said Pietro Spina, from the proprietor under whom he worked or from the company by whom the deceased may have been insured.

She confers for such purpose all the powers and authorities necessary and allowed by law, none excepted or excluded, for the accomplishment thereof, with authority and power to represent her in all steps and matters appertaining thereto, and ex-

pressly to transact and compromise and receive money, giving the proper receipts and releases to whomsoever is thereto entitled; and to represent her in judicial tribunals for the liquidation of the said indemnities and damages.

She declarees that even from now, and without requiring any other documents she approves and ratifies the doings of said attorney in fact regarding such matters.

I, the notary, having been requested, executed this document, which, being subscribed, I read in a clear and intelligible voice in the presence of the witnesses and of the said Giuditta Petrocelli, and she being interrogated, approved and confirmed the same.

By me written and drawn, the document is contained in this only folio with seal of which there are two written pages [70] and this third page to this point of twenty-one lines.

GIUDITTA PETROCELLI.
MELILLO DOMENICO.
PETROCELLI DOMENICO.

[Seal of said Notary.] GIULIO GARGIA,
Notary in Moliterno.

[Stamp and Seal.]

Viseed for Legalization of Signature of Mr. GIULIO GARGIA, Notary in Moliterno.

Lagonegro — 3-8-1912.

The President

[Stamp and Seal] PERRONE.

A. SORRENTO, Consul.

Minister of the Department of Justice.

Viseed for Legalization of the Signature of Pres-

ident Perrone, Rome, August 9, 1912, Department of Justice, M. de CESARE.

[Stamp and Seal]

Minister of Foreign Affairs here attests the authenticity of the signature of M. de Cesare, Rome, August 9, 1912, Office of the Minister, V. Morone.

Kingdom of Italy,
City of Rome,—ss.

I, the undersigned, Vicenzo de Masellis, *Counsel* of the United States of America, at Rome, Italy, do hereby certify that V. Morone who has signed and sealed with the official seal of office, the annexed authentications of signature, was at the time of so doing and is, the duly appointed representative of the Ministry of Foreign Affairs of Italy, that his signature thereto as such is true and genuine and is entitled to full faith and credit.

In witness whereof I have hereunto set my hand and affixed my official seal this 13th day of August, 1912.

VICENZO de MASELLIS,
Deputy Consul of the United States of America, at Rome, Italy, No. 502.

[Seal of American Consulate, Rome, Italy.]

[Seal and Stamp of American Consulate, Rome, Italy.] [71]

[Exhibit "B"—Supplemental Power of Attorney.]

KNOW ALL MEN BY THESE PRESENTS: That I, Guiditta di Giovanni Petrocelli Spina, of

Moliterno, Italy, in further confirmation and ratification of my prior power of attorney to Saverio di Giovanni Petrocelli, executed at said Moliterno, on July 31, 1912, before Giulio Gargia, Notary in said Moliterno, and whereunto I have signed my name "Giuditta Petrocelli," have appointed and do hereby appoint said Saverio di Giovanni Petrocelli as my attorney in fact for me and in my name, to execute, transact and carry out and perform all and singular the matters, business and things in my said prior power of attorney referred; and in addition thereto, to become and be the duly appointed, substituted, qualified and acting administrator of the estate of Pietro (sometimes known as Peter) Spina, my deceased husband; and the more effectually to carry out my wishes in the premises, I hereby request the Superior Court for the State of California in and for the county of Merced, and all and every other court or courts having jurisdiction to appoint my said attorney in fact, above named, as such administrator of said estate of my said deceased husband, and to substitute my said attorney in fact as such administrat*ion* in the place and stead of any other person whatever to whom letters of administration upon said estate may have heretofore been issued; and in particular to substitute my said attorney in fact as such administrator in the place and stead of G. E. Nordgren, public administrator of said county of Merced, and I, the surviving wife, and now the widow, of said Pietro (sometimes known as Peter) Spina, do hereby make this written request that my said attorney in fact be appointed such administra-

tor, under and pursuant to [72] the terms and provisions of the Code of Civil Procedure of the State of California, and more particularly section 1365 of said code.

Giving unto my said attorney authority to do whatever is necessary to be done in and about the aforesaid business, as fully as I could do if personally present, and hereby ratifying all that my said attorney shall do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, I have hereunto set my hand, the Moliterno day of 23 November, 1912, one thousand nine hundred and twelve.

GUIDITTA di GIOVANNO.
PETROCELLI SPINA.

Signed and delivered in the presence of
GIULIA GARGIA,
Notary in Moliterno.

[Seal of Giulio Gargia, Notary in Moliterno.]

[Endorsed]: Supplemental Power of Attorney. Giuditta di Giovanni Petrocelli Spina to Saverio di Giovanni Petrocelli.

Dated November 23, 1912.

[Stamp and Seal]

Viseed for Legalization of Signature of Mr. GIULIO GARGIA,
Notary in Moliterno.
Logonegro 13–12, 1912.
The President.
PERRONE.

Cafarelli
Aggt.

Form No. 88a.

United States Consulate,

Naples, Italy, December 27th, 1912. [73]

I, William W. Handley, counsul of the United States of America, at Naples, Italy, do hereby certify that the signature and seal of the President of the Tribunal of Lagonegro, Province of Potenza, Kingdom of Italy, on the paper hereunto annexed are true and genuine and as such entitled to full faith and credit.

IN WITNESS WHEREOF: I have hereunto set my hand and affixed the seal of the Consulate at Naples, Italy, the day and year next above written.

W. W. HANDLEY,

Consul of the United States of America, Naples, Italy.

[Seal of United States Consulate, Naples, Italy.]

(Fee)
(Stamp)
(American Consular)
(Service)
(N)
(588)

Upon reading and filing the foregoing petition, I hereby fix the hearing of the same by the Court, upon Monday the 17 day of Feb. A. D. 1913, at 10 o'clock A. M. of said day, at the courtroom of said court, at the courthouse, in the city of Merced, as the time and place for such hearing.

Dated Jan. 30, 1913.

P. J. THORNTON,
Clerk of said Superior Court,
By ————,
Deputy.

[Endorsed]: No. 892 (Probate), Superior Court, County of Merced. In the Matter of the Estate of Pietro Spina, sometimes known as Peter Spino, deceased. Petition for Revocation of Letters of Administration, Original. Filed Jan. 30, 1913. P. J. Thornton, County Clerk. M. H. Farrar and J. J. Dunne, Attorneys for Petitioner. [74]

In the Superior Court of the State of California, in and for the County of Merced.

In the Matter of the Estate of PETER SPINO, Deceased.

Notice of Hearing.

Saverio di *Govanni* Petrocelli, a brother of the surviving wife of said deceased, and brother-in-law of said deceased, having filed in this court a petition praying that letters of administration upon the estate of said deceased, heretofore issued to G. E. Nordgren be revoked, and that such letters be issued to petitioner, who claims a prior right thereto;

Notice is hereby given that the matter will be heard on Monday, the 17th day of February, A. D. 1913, at the courtroom of said court, in the courthouse in county of Merced, State of California, at 10 o'clock in the forenoon of that day, and all persons interested in said estate are notified to appear

then and there, and show cause, if any they can, why petitioner's prayer should not be granted.

Dated this 30th day of Jan. A. D. 1913.

P. J. THORNTON,
Clerk of said Court.

_____,
Deputy Clerk.

[Endorsed]: No. 892 (Probate). Superior Court County of Merced. In the Matter of the Estate of Pietro Spina, sometimes known as Peter Spino, Deceased. Notice of Hearing. Filed, Jan. 30, 1913. P. J. Thornton, County Clerk. M. H. Farrar and J. J. Dunne, Attorneys for Petitioner. [75]

Office of the
Sheriff of the County of Merced,
State of California.

I, S. C. Cornell, Sheriff of the county of Merced, do hereby certify that I served the within citation on the within-named G. E. Nordgren, by delivering to said G. E. Nordgren, personally a copy thereof on the 30th day of January, 1913.

S. C. CORNELL,
Sheriff of the County of Merced.

Dated at Merced, Cal., this 30th day of January, 1913.

In the Superior Court of the State of California, in and for the County of Merced.

In the Matter of the Estate of PETER SPINO, Deceased.

Citation to Show Cause.

The People of the State of California, to G. E. Nordgren, Administrator of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased: Greetings:

By order of this Court, you, the said administrator of the estate of said deceased, are hereby cited to appear before said Superior Court of the State of California, in and for the county of Merced, at the courtroom thereof, in the courthouse in the county of Merced, in the State of California on Monday, the 17th day of February, A. D. 1913, at 10 o'clock, in the forenoon of said day, and show cause, if any you can, why your [76] letters of administration should not be revoked, and Saverio di Giovanni Petrocelli, brother of the surviving wife of said deceased, and brother-in-law of said deceased, be appointed as such administrator in your place and stead.

IN WITNESS WHEREOF, I, P. J. Thornton, Clerk of the said Superior Court aforesaid have hereunto set my hand and affixed the seal of said court this 30th day of January, A. D. 1913.

[Seal] P. J. THORNTON,
Clerk of said Court.

_____,
Deputy Clerk.

[Endorsed]: No. 892 (Probate). In the mattter of the Estate of Pietro Spina, sometimes known as Peter Spino, Deceased. Citation to Show Cause. Received 3:30 P. M., Jan. 30, 1913. S. C. Cornell, Sheriff. Filed Jan. 30, 1913. P. J. Thornton, County Clerk. M. H. Farrar and J. J. Dunne, Attorneys for Petitioner.

In the Superior Court of the State of California, in and for the County of Merced.

In the Matter of the Estate of PETER SPINO, Deceased.

Notice of Hearing.

Saverio di Giovanni Petrocelli, a brother of the surviving wife of said deceased, and brother-in-law of said deceased, having filed in this court a petition praying that letters of administration upon the estate of said deceased heretofore issued to G. E. Nordgren, be revoked, and that such letters be issued to petitioner, who claims a prior right thereto. [77]

Notice is hereby given that the matter will be heard on Monday, the 17th day of February, A. D. 1913, at the courtroom of said court, in the courthouse in the county of Merced, State of California, at 10 o'clock in the forenoon of that day, and all persons interested in said estate are notified to appear then and there, and show cause, if any they can, why petitioner's prayer should not be granted.

Dated this 30th day of Jan., A. D. 1913.

[Seal] P. J. THORNTON,
Clerk of said Court.

_____,
Deputy Clerk.

State of California,
County of Merced,—ss.

P. J. Thornton, county clerk of the county of Merced, State of California, being duly sworn, says that on the 30th day of January, 1913, he posted three notices, of which the foregoing is a true copy, in three different public places in the county of Merced, to wit: One at the place where the court is held, one at the postoffice, and one at the N. E. corner of 16th St. and Huffman Avenue, in the city of Merced, in said county.

P. J. THORNTON.

Subscribed and sworn to before me this 31 day of Jan., 1913.

W. B. CROOP,
Justice of the Peace.

[Endorsed]: No. 892. Superior Court, County of Merced. In the Matter of the Estate of Pietro Spina, Affidavit of Posting Notice. Filed Jan. 31, A. D. 1913. P. J. Thornton, Clerk. [78]

In the Superior Court of the State of California in and for the County of Merced.

In the Matter of the Estate of PIETRO SPINA, Sometimes Known as Peter Spino, Deceased.

Order Revoking Letters of Administration and Appointing Administrator.

Whereas, on the 30th day of January, 1913, Saverio di Giovanni Petrocelli, a brother of Giuditta di Giovanni Petrocelli*a* Spina, surviving wife of Pietro

Spina, deceased, having filed this petition in writing in the above-entitled matter, praying that G. E. Nordgren, the administrator heretofore appointed herein by this Court be removed, and that the letters of administration heretofore on the 26th day of July, 1912, issued to said G. E. Nordgren, be revoked and annulled for *an* on account of the reasons and grounds therein stated, and further praying that petitioner or some other fit and proper person be appointed as administrator of said estate of Peitro Spina, sometimes known *known* as Peter Spino, deceased;

And said petition coming on regularly for hearing by the Court this 17th day of February, 1913, proof having been made to the satisfaction of the Court that the clerk had given notice of said hearing as required by law, and that said administrator G. E. Nordgren was duly cited to appear and show cause, if any he had why letters of administration heretofore issued to him should not be revoked, and J. J. Dunne and Mercer H. Farrar [79] appearing as attorneys for petitioner, and Messrs. J. J. Griffin and H. Brickley appearing as attorneys for the administrator, said G. E. Nordgren; and said G. E. Nordgren by his said attorneys in open court consenting and agreeing to the revoking of the letters of administration heretofore issued to him and the appointment of said Saverio di Giovanni Petrocelli as administrator, in the above-entitled matter, and evidence oral and documentary having been introduced said matter was submitted to the Court for decision.

Now, therefore, the Court, after due deliberation on all the evidence adduced and the law in such case

made and provided, find that said G. E. Nordgren should be removed from the office of administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, and that his letters of administration heretofore issued as aforesaid should be revoked, annuled and vacated on the grounds that he is not the person rightfully entitled thereto by law and that the said Saverio di Giovanni Petrocelli is the brother of the lawful wife of the above-named deceased, and that said wife in writing has duly waived her right to act as administrator in said estate and requested the appointment of said petitioner as said administrator.

It is Therefore Hereby Ordered, Adjudged and Decreed, the said G. E. Nordgren be, and he is hereby removed from the office of administrator of said estate of said Pietro Spina, sometimes known as Peter Spino, deceased, and that said letters of administration issued to him on the 26th day of July, 1912, are hereby revoked, vacated and annuled.

It is Further Ordered, that letters of administration upon the estate of Pietro Spina, sometimes known as Peter Spino, deceased, issue to Saverio di Guovanni Petrocelli, the duly elected, appointed administrator of said estate upon his taking the oath [80] as required by law, and filing herein his bond in the sum of one hundred dollars as required by law.

Dated February 17, 1913.

E. N. RECTOR,
Judge of the Superior Court.

[Endorsed]: No. 892. Superior Court, County of Merced, in the Matter of the Estate of Pietro Spino, Sometimes Known as Peter Spino. Order Revoking

Letters of Administration and Appointing. Filed Feb. 17, A. D. 1913. P. J. Thornton, Clerk.

[Further Endorsed]: Recorded Feb. 17, 1913, in Book I, page 376 of Probate Minutes. By K. C. Ferguson, Deputy Clerk.

In the Superior Court of the County of Merced, State of California.

PROBATE.

In the Matter of the Estate of PIETRO SPINO, Sometimes Known as Peter Spino, Deceased.

[Order Granting Letters of Administration.]

The petition of Saverio di Giovanni Petrocelli, praying for letters of administration on the estate of Pietro Spino, sometimes known as Peter Spino, deceased, coming on regularly to be heard; and due proof having been made to the satisfaction of this Court, that the clerk had given notice in all respects according to law; and all and singular the law and the evidence being by the Court understood and fully considered. Whereupon [81] Pietro Spino, sometimes known as Peter Spino, died on the 1st day of July, A. D. 1912, intestate, in the county of Merced, that he was a resident of Los Banos, Merced County, California, at the time of his death, and that he left estate in the county of Merced, State of California, and within the jurisdiction of this Court.

It is ordered, that letters of administration of the estate of the said Pietro Spino, sometimes known as Peter Spino, deceased, issue to the said petitioner, Saverio di Giovanni Petrocelli, upon his taking the

oath and filing a bond according to law, in the sum of one hundred ($100) dollars.

E. N. RECTOR,
Judge of the Superior Court.

[Endorsed]: No. 892. Superior Court, County of Merced. In the Matter of the Estate of Pietro Spino, Sometimes Known as Peter Spino, Deceased. Order Appointing Administrator. Filed Feb. 17, A. D. 1913. P. J. Thornton, Clerk. J. J. Dunne and Mercer H. Farrar, Attorneys for Administrators.

[Further Endorsed]: Recorder Feb. 17, 1913, in Book I, page 371, of Probate Minutes. By K. C. Ferguson, Deputy Clerk. [82]

In the Superior Court of the County of Merced, State of California.

In the Matter of the Estate of PIETRO SPINO, Sometimes Known as Peter Spino, Deceased.

State of California,
County of Merced,—ss.

[Appointment of Administrator.]

Saverio di Giovanni Petrocelli is hereby appointed administrator of the estate of Pietro Spino, sometimes known as Peter Spino, deceased.

Witness: P. J. THORNTON,
Clerk of the Superior Court of the County of Merced, with the Seal Thereof Affixed the 17th day of February, A. D. 1913.

By order of the Court.

P. J. THORNTON,
Clerk.

State of California,
County of Merced,—ss.

[Oath of Administrator.]

I, Saverio di Giovanni Petrocellio, do solemnly swear that I will faithfully perform according to law, the duties of *administrat*— of the estate of Pietro Spino, sometimes known as Peter Spino, deceased.

Subscribed and sworn to before me this 17th day of Feb., A. D. 1913.

SAVERIO DI GIOVANNI PETROCELLI.

[Seal] P. J. THORNTON,
Clerk. [83]

No. 892. Records M. B., 4 page 229, Superior Court, County of Merced. In the Matter of the Estate of Pietro Spino, Sometimes Known as Peter Spino, Deceased. Letters of Administration. Issued to S. di G. Petrocellio on the 17 day of Feb., A. D. 1913. Filed Feb. 17, A. D. 1913. P. J. Thornton, Clerk.

[Bond of Administrator.]

KNOW ALL MEN BY THESE PRESENTS: That we, Saverio di Giovanni Petrocelli, as principal and Dominic Toscano and James Negra, as sureties, are held and firmly bound to Giuditta Spina and Assunta Spina in the sum of one hundred ($100) dollars lawful money of the United States of America, to be paid to the said Giuditta Spina and Assunta Spina for which payment well and truly to be made, we bind ourself, our and each of our heirs, executors

and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 17th day of February, 1913.

The condition of the above obligation is such, That whereas, by an order of the Superior Court in and for the county of Merced, State aforesaid, duly made and entered on the 17th day of February, A. D. 1913, the above-bounden Saverio di Giovanni Petrocelli, was appointed administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, and letters of administration were directed to be issued to him upon his executing a bond according to law in said sum of one hundred ($100) dollars.

Now, therefore, the said Saverio di Giovanni Petrocelli as such administration shall faithfully execute the duties of the trust according to law, then this obligation shall be void; [84] otherwise to remain in full force and effect.

SAVERIO DI GIOVANNI PETROCELLI.
D. TOSCANO. [Seal]
JAMES NEGRA. [Seal]

State of California,
County of Merced,—ss.

Dominic Toscano and James Negra, the sureties in the above bond, being duly sworn, each for himself says that he is a freeholder and resident within the said State, and is worth the said sum of one hundred ($100) dollars, over and above all his debts and lia-

bilities, exclusive of property exempt from execution.

D. TOSCANO.
JAMES NEGRA.

Subscribed and sworn to before me this 17 day of Feb., A. D. 1913.

[Seal] P. J. THORNTON,
County Clerk.

[Endorsed]: No. ——. Superior Court, County of Merced. Bond of Saverio di Giovanni Petrocelli, Given upon Qualifying. Approved this —— day of ———, A. D. 19——. Endorsed on Back: No. 892. Recorded P. B. B. 2 page 438. Superior Court, County of Merced. In the Matter of the Estate of Pietro Spino, etc., Deceased. Bond of Administrator (Saverio di Giovanni Petrocelli) Given upon Qualifying. Approved this 17th day of Feb., 1913. E. N. Rector, Judge of the Superior Court. Filed Feb. 17, 1913. P. J. Thornton, Clerk. [85]

All enclosed in a cover endorsed:

No. 892. Probate. In the Superior Court, County of Merced, State of California. In the Matter of the Estate of Peter Spino, Deceased. Filed July 16, 1912. P. J. Thornton, By K. C. Ferguson. Deputy Clerk.

Also on cover:

No. 42 Cir. U. S. Dist. Court, So. Dist. of Cal. No. Div. Petrocelli vs. Miller & Lux, Pls. Exh. 1. Filed May 8, 1914. Wm. M. Van Dyke. By Leslie L. Colyer, Deputy.

[Endorsed]: No. 892. Probate. Superior Court, County of Merced, State of California. In the Mat-

ter of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased. Copy Probate Record.

42 Civ. U. . Dist. Court. So. Dist. of Cal. *No.* Div. Petrocelli, etc. vs. Miller & Lux, Inc. Pl's Exh. A. Filed May 17, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [86]

Mr. DUNNE.—By stipulation of counsel, I read into the record as evidence in this cause from the American Experience Table of *Motality,* the facts that the expectation of life of a person 36 years of age is 31.07 years and the expectation of life of a person of 31 years of age is 34 years and .63.

The COURT.—How many days is .07?

Mr. DUNNE.—.01 of a year would be three days and .65, and 7 times that would be something like 24 or 25 days.

The COURT.—The age of the deceased was 36?

Mr. DUNNE.—I was going to prove that. And the widow was 31 on the first of July, 1912.

The COURT.—And any children in the case?

Mr. DUNNE.—Yes, sir. I propose to call the widow now and prove those facts by her.

Mr. TREADWELL.—She testified before. I am perfectly willing to let her testimony go in as it is.

Mr. DUNNE.—That will save the necessity of calling her. By consent of counsel I will read in evidence to you, gentlemen, the testimony of the widow, as given upon the former trial, which reads as follows: [87]

[Testimony of Mrs. Giuditta Petrocelli (Given at Former Trial), for Plaintiff.]

Mrs. GIUDITTA PETROCELLI, a witness on behalf of plaintiff, testified as follows:

A. G. Laverone acting as interpreter:

My name is G*ui*ditta Petrocelli. I knew Peter Spino (or Pietro Spina) in his lifetime; I was his wife. We were married in Moliterno, Italy, thirteen years ago. He was 36 years old at the time of his death. I was 31 years old at the time he died. My husband supported me during his lifetime; that is all, he had nothing else. Just all I got was just whatever my husband used to send me. He sent me about $250 a year. He left Italy to come to the United States seven years ago. I left Italy on the 25th of December, to come to the United States. I arrived in New York on the 12th of January, and got to California on the first of May. During the seven years that my husband was here in the United States up to the time of his death, he sent me $250 a year on the average all the time. I have one child, Assunta Spina, ten years old on the 15th of next August.

(Plaintiff rests.)

[Motion for a Nonsuit (Grounds of).]

Defendant thereupon moved for a nonsuit on the following grounds:

First, that there is no evidence to sustain the allegation of the complaint that the deceased came to his death by reason of any negligence or any wrongful act on the part of the defendant.

Second, that there is no evidence to support the

claim [88] of the complaint, that the defendant was guilty of negligence in failing to provide the decedent with a reasonably safe place to work.

Third, that there is no evidence to support the allegation of the complaint that the defendant was guilty of negligence in using or permitting to be used any vicious animal, or that the animal in question was in any way vicious or improper to be used, under the circumstances.

Fourth, that there is no evidence sufficient to justify the claim of the complaint that the defendant permitted the mule team to be approached, without any care, or without any effort to control the horse in question; but, on the contrary, the undisputed evidence shows that due care was used to control the horse in question.

Fifth, generally, that there is no evidence of any kind in the record showing any negligent act of the defendant which in any way contributed or caused the death of the decedent.

After argument, the Court denied said motion, to which ruling the defendant duly excepted. [89]

[Testimony of D. W. Wallis, for Defendant.]

D. W. WALLIS, a witness on behalf of the defendant, testified as follows:

I am manager for Miller & Lux, and have been employed by them for about sixteen years; during that time I have been in the San Joaquin Valley, superintendent of the Los Banos Division a portion of the time, up to two years ago. I have been familiar with farming operations and have been engaged in that business for about thirty-five years. For the

(Testimony of D. W. Wallis.)

last twenty-five years I have had charge of farming operations, and am familiar with the methods used in the valley and throughout the State in harvesting grain.

The property was known as Midway Camp; was under my general supervision at the time of the accident. I am familiar with the harvesters that were used at that time.

Q. Is that the form of harvester generally used throughout the valley and throughout the State in harvesting grain?

A. This was a Holt harvester. There are more Holt harvesters used that any other harvester in the State.

The harvester is equipped with a place for the driver to sit. It is situated right over the wheel horses. It is reached by a number of boards nailed across for a ladder. It goes up to the seat, and the driver goes up that ladder, you might call it. There is a place for the driver's feet and a place for his whip; there is a brake for the driver to operate. He controls the leaders with a pair of lines.

I am familiar with the manner in which fields are checked. This was an irrigated field. It is checked in 4″ contours. The levee is about 6″ for a 4″ contour. You would have your levees about 6″ in height. Of course they are made so that you can run over them with a mowing machine or any kind of machinery, made [90] so that you go over them like you would a bank in a road, or something.

I know Mr. Fred Twining. He was in the employ

(Testimony of D. W. Wallis.)

of the company at the time of this accident. His duties were to go to each harvester and find out how much grain they had harvested and get the number of sacks.

I am familiar with the horse he was driving at the time of the accident. I do not know how old a horse it was. I think the horse was six or seven years old. I don't know the exact age, because we have so many horses, I don't pay any particular attention to the age. We had it on the ranches for some little time; I know the painters had been using it. It had been on the ranch perhaps 2–3 years. I did not know anything about, ever hear about the horse being in any way vicious, or anything of that kind. I know that the painters used the horse. I know the horse was driven by the painters, and then it was driven by this boy to the machine, and afterwards driven by Mr. Miller, the foreman. I never knew of the horse being vicious, fractious, or liable to run away, or anything of that kind. The horse was "good life," but, on the contrary, would stand around without being hitched, tied up.

The duty of the driver of the harvester is to drive the harvester and watch his team, and if anything happens to scare the team he is supposed to put on his brake and keep the team straight, or circle them, if it is better to circle them. He has to use his judgment about it. He can most assuredly, and with the lines he is supplied with. The leaders control the team, and if the leaders are controlled, the team is controlled. [91]

(Testimony of D. W. Wallis.)

If the brakes are set the machine stops, and that acts like a plow, it digs into the ground; it will dig a ditch, if they go on with the machine. It is not possible for a team to run any considerable distance if the brakes are set; they cannot run a great distance. They might run a short distance, but they cannot run very far, if they did the ground would be all plowed up where they ran. I have driven myself a great deal, a long time, I hate to tell how long. I have been in a good many runaways in my time.

Q. And if a man is driving, and holding on to the lines, as he should, even if he does fall off, does he leave the lines drop on the seat, or take them down with him? A. I always took them with me.

Q. Now, in your long experience, Mr. Wallis, with people driving these combined harvesters, what has been your experience as to the safety of the place where the man sits that drives the harvester?

The Court sustained the objection of plaintiff to the foregoing question.

Q. Well, during the long experience you have had with these harvesters and the men driving them, have you known of a man being killed, driving?

Mr. DUNNE.—That is objected to as immaterial.

The COURT.—I will sustain the objection, I think, Mr. Treadwell, that the inquiry is limited as to whether that is the usual and ordinary way of construction and operation of the machine.

Mr. TREADWELL.—He has already testified to that, and I will agree to that myself. That is all; that will be all. [92]

(Testimony of D. W. Wallis.)

Cross-examination.

The ladder approaches at a certain angle over the wheels, over the front wheel, so to speak of the harvester. Between the two horses is a pole or tongue, and the ladder is at an angle of about 45°, the lower end of which is attached to the frame of the machine. There is a single wheel in front that is attached to the harvester. When the harvester moves to the right or left the ladder moves to the right or left of the machine. As a rule those ladders are about 10–12 feet high, might be a little longer or a little shorter, but it takes a man so he is over his wheelers about midway of the horses. I could not say they ever run as long as 18 feet. I never measured one; I am just guessing at it. I was not at the scene of this accident at the time that it occurred. I know the horse that the boy was using. I do not know of my own knowledge the particular horse the boy was using that morning from seeing the horse myself, but I know from my own knowledge, from information that I have received.

Q. So that the basis then of the answer that you gave here was information you got from other people, isn't that so?

A. Not about the horse, about him using it that day; because the horse I know perfectly well, and know the men that used it.

Q. So that the basis of your answer then as to the horse that the boy was using that day is information that you obtained from other people?

A. I didn't see him that day, no. I could not say

(Testimony of D. W. Wallis.)

whether I did or not see him most every day. It is so long ago I could not say. I must have seen him that day or the day after because at the time of the accident I think I was away from home. I don't remember exactly now. It is a number of years ago. [93]

I don't think I was on the ranch on the day of the accident. I have an office on the ranch about four and a half miles from the place of the accident. I do not recollect meeting the boy Twining in my office two or three days after the accident. I do not recollect having the conversation with Mr. Knight in the presence of this boy Twining as to how this accident happened. Most likely I did, but I don't remember having the two of them together. Of course after the accident, immediately, we inquired into all the details of it, naturally would, but I have no recollection now of what if anything was said at that time.

Redirect Examination.

I identify the horse by knowing the horses as I have charge of all the horses in the country there. I know each horse that is handled around by different people, what they will do, and so forth. It was a little brown mare, about 8 or 900 pounds; she is small. I think Twining told me himsef that that was the horse that he was driving that morning.

Recross-examination.

I do not recollect when it was that Twining told me that; must have told me as soon as I saw him, but it is some four years ago. I do not recollect anything else Twining told me, nothing more than they

(Testimony of D. W. Wallis.)

had a runaway and that he came in and went back and saw the man was dead, and went back and hunted up somebody to go after him, and came right on in to the ranch and notified the foreman. Mr. Twining told me that he went to where the man was killed, and then went and told the foreman, and then came to town. [94]

[Testimony of C. K. Safford, for Defendant.]

C. K. SAFFORD, a witness on behalf of the defendant, testified as follows:

I reside in Merced County, on the west side, Delta Division. I work for Miller & Lux and have been employed by the company 13 or 14 years. I have lived in the valley thirty years. I am familiar with farming operations, including the harvesting of grain; have had charge of combined harvesters that are used for that purpose. I have seen a good many Holt harvesters; those harvesters are the harvesters used throughout this country in harvesting grain. I know where the seat of the driver is situated, and how it is constructed, and it is the usual and ordinary method of handling harvesters in this country. The duty of the driver in case of an accident, in case the horses or mules become restive, or anything of that kind, is to put on his brake and stop his team. He also has the lines for controlling the team. I know the horse that Fred Twining was driving the morning of this accident—well, I suppose it is the same horse. I think I have known the horse for 7 or 8 years. It has been in the use of the company during all that time. I had this horse at one time at the Henderson

(Testimony of C. K. Safford.)

place. It has also been used around Canal Farm, Los Banos Farm.

On the Henderson place the irrigators used it in the cart. The irrigators drove around to various places to turn on the water and would use this horse in a cart. It was a small mare; I don't think it would weigh over 850 pounds; generally used her single, worked both ways, single and double. I do not know how well bred she was. It was a mare. We used to let her stand around without hitching. We used to let her stand around without tying up, the irrigators using her. I never knew of her being a vicious or unmanageable horse or anything of that kind. **[95]**

Cross-examination.

I don't remember ever using the horse myself. The roustabouts sometimes used to use her. I would not say exactly how many years she was used, but I have known the horse for quite awhile. My best recollection is 7–8 years. There are lots or horses on the farm, and I don't remember ever driving this one.

I have driven harvesters. In case the mules became scared I would put on the brake and use the lines to stop the team.

Q. If that is the case, what is the purpose of the other two brakes on the harvester?

A. Well, they can lock all the wheels. The bull wheel, the big wheel, is the main brake. The one up on the seat is operated by the driver; that is the long iron rod that runs back from his foot to the brake, the same as on a wagon.

(Testimony of C. K. Safford.)

Some of them I think are operated with the foot and hand both.

Q. Well, wouldn't you think it would keep a man pretty busy to handle 32 mules and operate a brake at the same time?

A. Well, I have done it myself. The sack-sewer has a brake; I don't know if I could describe it on this particular machine. The sack-sewer is in the place they call the doghouse, and there is a brake there and there is a brake on the other side for the separator-tender to attend to, and if the horses start with the machine, they can throw all these brakes on.

The COURT.—Are all these brakes on the bull wheel, or different wheels?

A. No, they are all on the one wheel. [96]

The COURT.—Go ahead, Mr. Treadwell.

The JUROR.—I do not understand yet whether this witness and the other witness—I don't understand what the other two brakes are for, whether merely in the nature of emergency brakes, or to stop the machine.

A. Well, a man is there by his brake, and when the team starts, he would naturally throw it on.

Q. Suppose the other brakes were not used, could he stop the machine? A. They couldn't go far.

Mr. DUNNE.—But he couldn't stop the machine with that one brake?

A. The driver?

Q. Yes, with that one brake stop the 32 mule team?

A. I don't imagine the one brake would stop them immediately. I couldn't say whether the driver was

(Testimony of C. K. Safford.)

tied in his seat or not. I have known drivers to fix themselves in. This is generally done by the driver. I don't think the harvester comes with these attachments to be tied in. The seat has a tendency to whip about as you are rocking around; it would naturally go with the machine. As it rocks over a levee it will whip around and this strap is put around them by some drivers to prevent them from being thrown out. I do not think that those straps usually come with the harvesters. I am not in charge of that division at the present time; I was not familiar with that harvester; I do not know what harvester it was. It is my experience that straps do not usually come with the harvester. I have driven harvesters myself; have driven them without the strap, but I have heard of some particular drivers strapping themselves in, but other drivers do without the strap. [97]

The main brake on these harvesters is connected with a bull wheel. That brake is operated by the sack-sewer. Billy Trainor was the sack-sewer. Not being there, I don't know whether Trainor was on the harvester or not at the time of this runaway, so that he could operate the brake. The small wheel in front of the harvester I don't think has any brake on at all. The brake at the driver's seat operates on one of the main wheels of the machine. I do not know whether that brake operates on more than one of the wheels of the machine. On an ordinarily equipped machine the driver is supposed to be on his seat all of the time, and is supposed to have his lines in his hands all the time, and the brake is right there

at his foot or hand, whichever it happens to be, so that he is always at that station. The sack-sewer is sewing sacks. He is not simply there to attend to the brake. The brake is there where in an emergency he can run to it and use it, and the foreman of the gang, like Mr. Knight, his duties are all over the crew to watch the whole thing, but in an emergency he can run to the brake. If the team starts running the whole of them make a united effort to apply the brake. If they are not badly frightened one brake might *not* stop them if they were running away; I could not say; probably they might drag the machine a little ways. It makes a big difference whether you put on the brakes promptly, before the machine gets into rapid motion, or you wait until it gets into rapid motion and then attempt to put on the brakes; but if the horses are immediately controlled by the lines and the brake, ordinarily they can be stopped, before they get into a gallop.

Beside the sack-sewer there is also a sack-tender. His duties would not always be the same as the sack-sewer in regard to the brake. [98]

[Testimony of B. M. McSwain, for Defendant.]

B. M. McSWAIN, a witness on behalf of defendant, testified as follows:

I am a painter and reside at Los Banos. I was working for Miller & Lux in 1912 as a painter. I drove a horse and travelled from place to place to do this painting on the different ranches. There were three of us. I was not there in the field on the day that Mr. Twining was there in the field the time this

(Testimony of B. M. McSwain.)

man was killed. I saw Fred Twining driving a horse that day. I know the horse he was driving. He was attached to a cart. I have known that horse about six months; had known it six months before that time. I had been driving it. That was the horse I was driving in my business as painter. I had it attached to a cart. It was high-life, and after driving it awhile—to start out with it was pretty high-life, but after you drove it, you could get out and leave it stand any place. That is about all I can say for the horse, it was high-life. You could let her stand; get right out and throw the lines down, over the back of the seat, and I don't think she would run away. She didn't while I had her, so far as I know there was nothing vicious or unmanageable about the horse. What I mean by "high-life" is whenever you slap her with the lines she was always up and coming. She could move along in good shape and would trot along good and fast, if you wanted her to; she was a light horse. I used her about 6-7 months, and drove her on different jobs; took her along county roads past automobiles. She took to automobiles all right after awhile, that is, after we were driving her awhile. We took her right up out of the field to drive her and of course to start with she shied a little bit, it didn't amount to anything. **[99]**

Cross-examination.

I drove the horse just before Mr. Twining took it; that is before the accident; Mr. Twining just borrowed the horse one day from us, as we were working in the shop at the time, and that was the day

(Testimony of B. M. McSwain.)

Spina was killed; before that I had been using the horse myself.

[Testimony of Joseph Miller, for Defendant.]

JOSEPH MILLER, a witness on behalf of defendant, testified as follows:

I reside at the Henderson ranch at Los Banos, Merced County. It is one of the Miller & Lux ranches. I am foreman of the ranch and in the employ of Miller & Lux. I have worked for the company fourteen months and have been in the valley four years. I know the horse that the painter drove; and afterwards was driven by Mr. Twining. I had the horse. They told me it belonged to the ranch. I had it on the ranch and used to drive it. I got the horse after the accident, it was on the ranch when I came. I had it for six weeks at the ranch, and then they drove her up here to Fresno when it was brought here on the other trial of this action. I had had it six weeks at my ranch, and used it for driving around to my work. I drove her myself in a cart, sometimes in a buggy. She was a small horse, about 800–850 pounds. Stands wherever you wanted her to—all-round nice horse, nothing wrong with her as far as I could see, as far as my knowledge is concerned. I have been around horses all my life. She would be just the kind of horse that you would drive around on that kind of work. I missed her very much when she left. She did not show any actions of any kind toward viciousness. **[100]**

[Testimony of Fred Twining, for Defendant.]

FRED TWINING, a witness for defendant testified as follows:

My home is in Fresno; I am temporarily in San Francisco. I live with my father Dr. Twining. I am now working at the Exposition in connection with the San Joaquin exhibit. At the time of this accident I was 17, I believe. I was counting sacks on harvesters; had been in that employment about a month and a half. On the renters' harvesters I would count the *acks* that were in the stacks; and on the Miller & Lux harvesters I would get it from the sack-sewers. I drove from place to place in a cart with a horse, and had been doing that for some month and a half. On the day of the accident, I was driving a horse and cart for that purpose. It was a different horse from the one I had been using before. It was the painters' horse that I was using on that day; the same horse that the painters had been using before. By "the painters" I mean Mr. McSwain, I believe, I don't know them personally. Prior to that time I had known nothing about this horse at all; that was the first time I had driven it. I drove it out of the field at the Canal Farm, south of Midway Ranch. I harnessed it myself and had no trouble harnessing the horse, and then drove it down the road to Midway Camp—about four and a half miles, and I think the harvester was about a mile out. I drove it along the road to what was known as Midway Camp, a distance of about four and a half miles. I left Canal Farm about half past seven in

(Testimony of Fred Twining.)

the morning. I drove through the camp and continued down the field toward the harvester; that was the first harvester I visited. After leaving Midway Camp I went down a road past the **[101]** field about a mile. I travelled in the field before coming to the harvester about six hundred yards. I believe the accident occurred at half past eight; that is my best recollection. The horse is a pretty good traveller; I made the six miles in about an hour. I trotted right along from Canal Farm to Midway Farm; went through the grain field as I approached the harvester. The stubble was all cut. It was checked. I had to drive and did drive right over the checks clear across the field. During the six hundred yards after I got into the field, heading down toward the header, I was going over checked land all the way. I made direct for the harvester; that was my objective point. Driving across the grain field it is usually plowed up, and the cart would bounce to one side and the other, and it would be uncomfortable to trot across, and I usually walked my horse. Going across the field I walked my horse that morning. From the time I left Los Banos until the time I arrived at the harvester there was no time during that period that this horse was out of my control in any way. During all that time I did not have any trouble with it in any shape or manner. I drew up to the sack-sewer's side of the harvester—left side. The sickle is on the right-hand side. I was about 3 or 4 yards away from the machine on its left-hand side. I could not say how straight I

(Testimony of Fred Twining.)

came going across the field. I don't remember if there were any irrigation ditches or not; if there were I went around them; my aim was to go practically straight. I had my horse under control at all times crossing the field. When I came up to the harvester on the left-hand side; the harvester goes along very slowly and my horse was walking. My horse was going just about the same as the harvester. When I came up to the machine I was driving the horse. I had the lines in my hand when I came up there. I drove up to the side of the harvester, and I had the lines in my hand, **[102]** and I believe that I changed them to my left hand and held them with my one hand, and turned in my seat towards the harvester. The sack-sewer got out and started to give me the count, and just at that moment, I believe, the harvester went over a check sideways, and the wheel on the right side of the harvester was up on top of a check, while the wheel on my side was down over the check, making the harvester look as though it was going to tip over, and that is what scared my horse, and he started out from the harvester, and that is all I saw of the accident until I turned around and saw the men with the harvester in a kind of a little bunch, and I trotted back towards them and asked them what was the matter, and they said that the driver had been badly hurt or was killed, they didn't know, and so I turned my horse right way and in a hurry I went after the foreman of the ranch. I met him down the road. He was riding a white horse, and I told

(Testimony of Fred Twining.)

him of the accident, and then I went straight on into the Canal Farm.

When my horse started to run I had my lines in my left hand and was looking back towards the machine.

I knew Mr. Trainor. One of them got off the machine—I don't remember who it was; that is between the machine and myself. The machine was running. It makes quite a bit of noise. I did not have any talk with the man on the machine that got off the machine. I had not been able to talk to him at all, it happened so quickly. He had not got up to my cart yet.

Q. Now, when your horse started to run and you had your lines held in your left hand, do you remember how tight or taut you had the lines at the time you were driving along, whether they were loose or taut, or what?

A. I held them so that I had perfect control of the horse, at any moment. [103]

Mr. DUNNE.—I move to strike that out as not responsive to the question.

The COURT.—That will be stricken out, and I wish you would talk a little louder.

Mr. TREADWELL.—Just tell the Court about how you were holding them when the horse was walking alongside the harvester and you had them in one hand, that is, if you remember how you held them? A. I don't remember.

Q. You don't remember how taut you were holding them?

(Testimony of Fred Twining.)

A. I know that I had them tight enough to keep the horse under control.

The lines were regular buggy lines. I know that I had them under me, and they hung down the back about two feet. This is the same harness I used before, although the horse was different; ordinarily when I used the lines the lines were under me on the seat and hung down a couple of feet behind. When I was holding them in my hands I was sitting on the lines. When the horse started to run I grabbed the lines with both hands and tried to hold them, but on account of the checks I would bounce out of my seat and I would loosen them again, and he would get another start. I would bounce up from the seat. During all that time I had the lines in both hands. I never at any time lost control of the lines from the time the horse started to run and I took the lines from one hand to two. I kept them in two hands all the time that it was being bounced up over these checks.

The horse ran until I got him entirely under control, I should say a block, about 300 yards. **[104]**

Here the Court with the usual admonition to the jury, takes a recess of ten minutes.

AFTER-RECESS SESSION.

The COURT.—Gentlemen, as to the evidence of this widow that was given before, I read it over again, and it seems to me ambiguous as to whether or not this child is the child of the deceased, and I notice in your instruction, Mr. Dunne, instruction in regard to damage, you don't take into considera-

(Testimony of Fred Twining.)

tion the child at all. Am I to understand that this child is not his child.

Mr. DUNNE.—No, your Honor. The child is his child.

The COURT.—The jury could infer from the evidence it is his child.

Mr. DUNNE.—Yes, that is the fact and truth, as I understand it.

The WITNESS.—(Continuing.) When I got the horse under control I looked back; the mule team was still running. I saw it when it stopped. Some man ran alongside the mules and got hold of the leaders. I turned the cart around. I saw these men back where the harvester started. I drove back. I did not drive all the way back; I drove back within talking distance. I just saw these men, I could not see the driver. They told me the man was either killed or unconscious. I have no recollection as to what particular man I talked to at that time. I did not know any of the men personally I know Mr. Kinght by sight; I have seen him since; I knew him at that time; I do not remember whether I talked to him or to someone else, but I did find out what the condition was. I then drove to the foreman of Midway Camp, Mr. Allen, and met him on a white horse riding horseback. I told him of the accident. I believe he went out to the harvester and then came back. I went into town. From **[105]** the time the horse started to run until I finally got it under control, I did everything in my power to control the horse. I am left-handed.

(Testimony of Fred Twining.)

Cross-examination.

On July 1st, 1912, I was 16 years 6 months and 18 days old. At that time I was going to school and continued to go to school until the 26th of January, 1915. I graduated last June and then took up the Junior College course. During those times I was living at home with my parents. I did not see Spina leave his seat on that occasion. I did not see Mr. Spina, the driver of the team leave his seat on that occasion; I do not know under what circumstances, if any, Spina actually left that place, and I could not say whether it was the sudden turn to the right, or the structure of the seat, or the high ladder, or what it was, that made Mr. Spina leave that seat. I do not know under what circumstances he actually left that place. The men told me he was unconscious. I did not see him. My horse was alongside the harvester. My horse ran and the mule team ran and later on when I returned to talking distance I was advised that Mr. Spina was unconscious. When I was alongside the harvester my horse was walking and the mule team was walking, too. The reins were in my left hand. I changed them to my left hand. At that time I was looking toward the machine and the sack-sewer was getting out of the harvester on the side I was on. He started to go toward me. I was looking toward the harvester. It was then that the horse ran. The field through which I came was plowed and for that reason I walked my horse. I was not a witness before the coroner's inquest. I was not out counting grain sacks. I don't remem-

(Testimony of Fred Twining.)

ber whether I was out counting grain sacks at that time at Sentinel farm; I don't recollect going to Sentinel farm the day of this accident; Sentinel farm is one of the farms of Miller & Lux; I have been there; I do not remember **[106]** whether on the day *of* the coroner's inquest was held on the body of Peter Spina I was at Sentinel farm, a Miller & Lux farm some 12 miles off. I was in the office of Miller & Lux with Mr. Wallis and Mr. Knight after the accident. I don't recollect Mr. Wallis asking Mr. Knight how this man was killed, nor do I recollect the reply that Mr. Knight made; I do not remember whether I said anything else on that occasion—it is too long ago.

Q. I will ask you if it is not a fact that on that occasion Mr. Wallis wanted to know how it was that this man was killed, and Mr. Knight then and there charged you with being responsible for the accident, and you said nothing and remained silent.

A. Yes, sir. That occurred.

On the first trial of this case I was present here in Fresno County. I was not a witness on the last trial of this case. I have had conversations with the attorneys for Miller & Lux about this case. I told them all I knew about the case. I think what frightened my horse was the fact that the harvester was going over the ditch and it was tipped at an angle, and that was what frightened my horse, I said that that was what frightened him. I don't know anything different; I have never given a different explanation.

(Testimony of Fred Twining.)

Q. Now, I want to call your attention to the picture of the harvester here, and I call your attention to the ladder leading up to the seat where the driver is, and ask you if you didn't make the statement that it was this ladder which frightened your horse and not the tipping of the whole vehicle back here at an angle. A. Never. [107]

Q, Never. In San Francisco, on May 12, 1915, in the California Building at the Exposition, in the presence of J. F. O'Malley, were you asked to give the details of how this accident happened?

A. Yes, sir.

Q. On that occasion and to that gentleman, did you state that your horse was frightened, the reason your horse was frightened was because of this projecting ladder, which stuck out in front of the harvester proper?

A. Never.

Q. Never. Now did you have a conversation at that time with Mr. O'Malley?

A. Yes, sir.

Q. Will you relate that conversation?

A. He asked me—

Q. Asked you for the details?

A. For the details, yes, sir, and I told him the only way I knew, as I have stated here before.

Q. Just as you stated it here to-day?

A. Yes, sir.

Q. Now, at that time did you tell Mr. O'Malley that you were sitting in your cart?

A. No, sir.

(Testimony of Fred Twining.)

Q. Didn't Mr. O'Malley press you as to what the real cause of the accident was?

A. I don't remember.

Q. You don't remember. and in response to that didn't you tell him that you did not know because you were not looking at the mules at the time of the accident and that your back was to the harvester? Did you tell him that?

A. No, sir, I didn't. Well, when my horse was running, my back was to the harvester. **[108]**

Q. No, no. but didn't he say to you: "Please tell me what was the real cause of that accident," and didn't you then say to him "Well, I don't know, because I was not looking at the mules at the time?"

A. No, sir.

Q. "My back was to the harvester?" A. No, sir.

Q. Did you tell him at that time that your horse was facing the same way as the mules, going the same way, facing the same way?

A. Yes, sir.

Q. Did you tell him that you were not looking at the mules? A. No.

Q. Did you tell him that you were not looking at the mules, and the next thing you knew the mules were going like hell? Did you tell him that?

A. I don't remember.

Q. You don't remember. Did you also tell him on that occasion that you were sitting in your cart watching the men at work on the harvester when the accident happened?

A. I don't remember.

(Testimony of Fred Twining.)

Q. You don't remember. Did you also tell him that at that time you were waiting to get the count of the sacks? A. Yes, sir.

Q. And didn't O'Malley then ask you how it was that you should turn your back to the harvester, and did you not tell him then that you would not give him any more information? Did that occur?

A. I don't remember.

Q. You don't remember. It was in the afternoon, wasn't it, when Mr. O'Malley called on you at the Exposition? A. Yes, sir **[109]**

Q. And it was on the afternoon of the 12th of May?

A. I don't know what the date was.

Q. Oh, there is one thing I would like to ask you, Mr. Twining. You told us here in your direct examination that there was no talk between you and the man who stepped out of the harvester to come towards the cart, and the reason you gave for that was he had not got to the cart yet? A. Yes, sir.

Q. Now that man was Trainor, wasn't it?

A. Yes, sir.

Q. Wasn't it the sack-sewer?

A. I don't remember.

Q. Now, isn't it a fact, Mr. Twining, refreshing your memory a bit, that there was a conversation at that time, was some little talk at that time between you and that man? A. I don't remember.

Q. And didn't you in point of fact, at that time, say to that man that this horse that you were driving ran away with you twice this morning?

Mr. TREADWELL.—You mean when he was

(Testimony of Fred Twining.)

standing there at the harvester.

Mr. DUNNE.—I mean just what I am saying. I will fix the time specifically. At the time you were in your cart alongside the harvester, the mules walking, and your horse walking, and this man, this sack-sewer steps out of the harvester and starts to come *towards, right* at that time, and just before your horse ran, at the time when you say there was no conversation between you and that man because he had not yet got to the cart, I ask you if at that point of time there was not a conversation between you and that man in which you said to him that the horse ran away with you twice this morning.

A. I do not remember.

Q. You do not remember? That is all, Mr. Twining. **[110]**

Redirect Examination.

I was taking the count of ten harvesters at the time of the accident. I was not going to school; that was my vacation. Before that I went to the Fresno High School. I was in the sophomore year at that time. The field was plowed, I mean before it was planted. It was not a freshly plowed field. Prior to the first trial of this case on May 7, 1914, I attended a May Day Festival at Los Banos, the first of May. Mr. Treadwell, the defendant's attorney, was present there at that time. I remember meeting him and remember going over with him my version of the accident. I did so at that time. So far as I remember that was the first time that I had ever talked to him about the case. He had communicated with me in some way

(Testimony of Fred Twining.)

before that. But I do not remember whether I was to be present at the trial or not. At the time I told him my version of the accident, I told it exactly as I have told it on the stand now. I don't remember whether I was told that I would be wanted on the trial. I came back to Fresno the next day. I was at school at the time of the trial and he called me at the school. He got the number of the school where I would be so that he could call me at the school and let me know. I did not want to lose any time from my school; I wanted to go to school and stay there until I was wanted here by Mr. Treadwell. He had my father's number and my number at school. I was ready to come to testify at any time, and expected to be called as a witness.

Mr. TREADWELL.—I think it is only right it should be stated to the jury that the record shows that when the plaintiff got through with its case last time, the defendant refused to put in any evidence and didn't put in any evidence or call any witnesses. That is correct, Mr. Dunne?

Mr. DUNNE.—That is the fact. [111]

I was subsequently told that I would not be needed. The first time that I ever talked to the attorneys of this company at all was just before the trial of the case, shortly after the May Day Festival. When the case was called at this time I was again notified that I would be wanted. Was notified by telephone at the Exposition. I was told to come down here and testify if necessary. I have been in attendance here all the time; I was not asked to testify at the coroner's inquest.

(Testimony of Fred Twining.)

Q. Counsel asked you if, when you were driving alongside of the harvester on that morning, and Mr. Trainor or whoever it was was getting off the harvester to come towards you, if you didn't say to him that your horse had run away twice that morning, and, as I understood you you stated that you didn't remember stating that. A. Yes, sir.

Q. Well, did you state it?

Mr. DUNNE.—He says he does not remember.

The WITNESS.—I don't remember. The only thing that I remember is that he got off and at that moment my horse started.

Mr. TREADWELL.—Well, if your horse had run away twice that morning, you would know of it now? A. Yes, sir.

Q. And you were not simply telling him something that was not true that morning, were you?

A. No, sir.

Q. Counsel has stated something about some man named O'Malley. Where did you first meet Mr. O'Malley?

A. Mr. O'Malley introduced himself. [112]

Q. He was a stranger to you, then?

A. He said he was a newspaper man.

Q. He said he was a newspaper man. You don't know whether he was a newspaper man or a "gumshoe" man or what? That is correct?

A. Yes, sir.

Q. But he said he was a newspaper man and then started to ask you questions about this matter?

A. Yes, sir; he said that some man in the "Repub-

(Testimony of Fred Twining.)

lican," down here, had called him up to get the details on the case so that they could write it up in the "Republican."

(Defendant rests.) [113]

[Testimony of J. F. O'Malley, for Plaintiff, in Rebuttal.]

J. F. O'MALLEY, a witness on behalf of plaintiff in rebuttal, testified as follows:

I am a law student. I have my office with Daniel H. Knox, 1207 Claus Spreckels Building, San Francisco. I am acquainted with Merced H. Farrar, counsel for plaintiff, and Mr. Carter Farrar, his brother.

I recollect receiving a telephone on the 12th of May from Mr. Carter Farrar at San Francisco and called on him and had a conversation with him, and in consequence of that conversation went out to the Exposition at San Francisco; called at the California Building and inquired for Mr. Twining. I saw him and had a conversation with him. I called on Mr. Twining and asked if he was familiar with the case which was pending in Fresno County in which Miller & Lux was one of the parties. He said he was. I asked him was he familiar with the facts? He said he was. I asked him would he have any objection to giving the facts to me. He said no. He just asked me who I was. I told him I was from the "Examiner," and he proceeded then to tell me that he was driving a horse and cart for Miller & Lux, who had several harvesters working in the field, and he was to take the count of the sacks, and he said he was at the last

(Testimony of J. F. O'Malley.)

harvester, and on that harvester there was something like a ladder which came out over the mules. He said this ladder scared these mules and threw the man off the harvester and killed him. He said his horse did not get scared, just the mules got scared. I asked him if he knew the true cause of the accident. He said that he was standing watching the men working on this harvester. I don't know whether he said "man" or "men," I don't know which; that this ladder had scared [114] them and that this was the cause of the accident. He said the horse was facing the same way that the mules were, on the harvester, and that his back was to the harvester. The next thing he saw the mules—to use his own slang—"running like hell," and I then says to him, "Well, how is it that you had your back to the harvester." It was at this point that he told be that he should not give me any more information, but if I desired any to call on attorney Treadwell. If I am not mistaken, he mentioned the Merchants Exchange Building, which was his office, and thereupon the conversation between us ceased. He did not say a word about his own horse running, in the course of the conversation,

Defendant thereupon moved that the Court instruct the jury to render a verdict in favor of defendant and against plaintiff. The Court denied said motion, to which ruling defendant excepted. [115]

The foregoing constitute all of the evidence and proceedings on the trial of the above-entitled cause.

Thereupon the Court gave the following instructions to the jury:

[Instructions of the Court to Jury.]

1. In this case, the words "master and servant," as used in the pleadings and evidence, mean the same as principal and agent, or employer and employee.

2. I charge you that the rules of law relative to the liability of a master for the negligent acts of a servant committed in the prosecution of the master's business, apply to corporations as well as to individuals. A corporation, from its very nature, can act only through its agents, who are in law deemed its servants; and I charge you that in respect of liability for the acts of their servants, private corporations stand upon the same footing as individuals.

3. You are instructed that in certain States, including this State, laws have been enacted known as Workingmen's Compensation Laws under which the employee is entitled to compensation for injuries and his heirs for death irrespective of the negligence of the employer, but the plaintiff does not rely upon such laws and cannot recover upon them. If he had any redress under such laws it must be sought by proceedings other than this proceeding.

4. I instruct you that if the owner of an animal not naturally vicious, but which in fact is vicious, knows its vicious propensities or disposition, he is liable for an injury inflicted by it upon the person of one who is free from fault. But, in this connection, I further charge you that the knowledge of a servant to whom an animal is entrusted, of its disposition **[116]** or propensities, is the knowledge of the master sufficient in law to render the latter

liable, and I further instruct you that if, while in charge of the animal, the servant acquires knowledge of its disposition or propensities, then the circumstance that this knowledge was acquired after the animal was taken in charge and was not known either to the servant or to his employer at the time when the charge of the animal commenced, will not exonerate the employer from liability.

5. You are instructed that defendant was only required to use ordinary care in the selection of horses and other appliances. If the horse in question was such a horse as a reasonable prudent man would ordinarily use under the circumstances defendant was not guilty of negligence in that regard. The mere fact that the horse had characteristics not uncommon in horses of that age, and which would not be deemed by a man of ordinary prudence to make it unfit for use, would not make the use of such horse negligence.

6. If the harvester in question was constructed as harvesters are usually constructed and was such as men of ordinary prudence use in their business defendant was not guilty of negligence in employing such a machine.

7. You are instructed that where a horse runs away with the driver, there is no presumption of negligence.

8. Negligence is the doing of some act which a reasonable and prudent man would not do; or the omission to do something which a reasonable and prudent man would do, actuated by those considerations which ordinarily regulate the conduct of human affairs; it is the failure to use ordinary care

or skill by one sought to be charged with negligence in the management of his property or person. **[117]**

In determining the issue of negligence and of contributory negligence, the Court instructs you that the burden of proving negligence is upon the party asserting such negligence; but in determining whether or not there has been such negligence you will consider all of the evidence bearing upon that subject regardless of which party introduced the same. That is to say, if you find that the greater weight of all the evidence is in favor of the negligence of the defendant, you should accept that as a proved fact in the case; while if the evidence on that issue is in your judgment evenly balanced, or preponderates against such negligence it is not proved, and you should find that the defendant was not negligent. If you find that the greater weight of all the evidence is in favor of the contributory negligence of the plaintiff, you should accept such contributory negligence as a proved fact; or if the evidence on that issue is, in your judgment, evenly balanced, or preponderates against such contributory negligence, it is not proved, and you should find that the plaintiff was not guilty of contributory negligence.

Negligence on the part of either the plaintiff or the defendant is of no consequence in the case unless you also find that such negligence was a proximate cause of the injury. By proximate cause is meant the efficient cause; the one that necessarily sets the other cases in operation. It is that which is the actual cause of the loss, whether operating directly, or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which

the loss is produced, it is the cause to which such loss should be attributed.

In order, therefore, to find a verdict for the plaintiff, you must not only find from a preponderance of all the evidence that the defendant was negligent; but also that such negligence [118] was the proximate cause of the injury to the plaintiff; and you must further find that the evidence fails to show by a preponderance thereof that the plaintiff was guilty of negligence, however slight, contributing proximately thereto; otherwise your verdict must be for the defendant.

9. On the subject of contributory negligence, I charge you that the law makes due allowance for the mistakes or errors of judgment which are likely to happen during emergencies. I charge you that a mistake of judgment should not be confounded by you with contributory negligence; a mistake of judgment is not contributory negligence.

10. You are instructed that in order for plaintiff to recover in this case he must show that defendant was guilty of negligence and that such negligence was the cause of the death of the decedent. In this connection you are instructed that an employer is not responsible for the death of the employee unless the employer was guilty of negligence. If therefore you find that the death was accidental, and not caused by any negligent act of defendant, the plaintiff cannot recover. The employer is not an insurer nor is it to be held liable for injuries merely of an accidental chr*ac*ter, and not caused by its negligence.

11. If you find from the evidence in this case that

on July 1st, 1912, the deceased was a married man, and left him surviving a widow and child, and that on said date he came to his death by the negligence of the defendant here, you will, as I have already instructed you, find a verdict in favor of the plaintiff; and you will then proceed to consider the question as to the amount of damages to be awarded because of said death; **[119]** and I instruct you that such damages may be given by you as under all the circumstances of the case may be just; and in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by the widow of the deceased, by reason of the death of the deceased. Upon this question of damages, you should estimate and determine the amount that the deceased, in all reasonable probability, would have earned in the years yet remaining to him; and deducting from this the amount which he would reasonably require for his own personal use and maintenance, give a verdict which would pecuniarily compensate the widow and child, and in estimating the pecuniary loss, if any, to the widow and child, you have a right to take into consideration the loss of the society, comfort and care suffered by her and said child by reason of the death of the husband and father. You must not take into consideration the sorrow that the widow and child suffered by reason of the death of the deceased.

12. It is the exclusive province of the Judge of this court to instruct you as to the law that is applicable to the case in order that you may render a gen-

eral verdict upon the facts in the case, as determined by you, and the law as given to you by the Judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any other view of the law than that given to you by the Court, a wrong for which the parties would have no remedy, because it is conclusively presumed by the Court and all higher tribunals that you have acted in accordance with those instructions as you have been sworn to do. If the Judge should be in error in his instructions to you as to the law, the parties [120] have a plain remedy to correct such error by appeal or new trial.

On the other hand, it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose. The Court cannot determine the facts, nor aid you in arriving at them except by giving you the rules of law to be used by you in arriving at the truth. You are the sole judges of the effect and value of the evidence. Your power, however, of judging of the effect and value of the evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a lesser number or against a presumption of law or evidence which satisfied your minds; in other words, it is not the greater number of witnesses which should control you where their evidence is not satisfactory to your minds, as against a lesser number whose testimony does satisfy your minds.

In weighing the evidence you are to consider the credibility of witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. The conduct of the witnesses; their character, as shown by the evidence; their manner on the stand; their relation to the parties, if any; their interest in the case; their bias and prejudice, if any; their degree of intelligence; the reasonableness or unreasonableness of their statements, and the strength or weakness of their recollection may be taken into consideration for the purpose of determining their credibility. A witness is presumed to speak the truth, this presumption, however, may be repelled by the manner in which the witness testifies, by the character of his testimony, or by testimony affecting the character of the **[121]** witness for the truth, honesty, or integrity, or his motives, or by contradictory evidence.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; and being convinced that a witness has stated what was untrue, not as the result of mistake or inadvertence, but wilfully and with a design to deceive, you must treat all of his testimony with distrust and suspicion, and reject it all unless you shall be convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth.

The testimony of a witness is said to be corroborated when it is sworn to correspond with the rep-

resentation of some other witness, or comport with some fact or facts otherwise known or established by the evidence. You should not consider as evidence any statement of counsel made during the trial, unless such statement is made as an admission or stipulation conceding the existence of a fact or facts. You are not to consider as evidence or law any argument, comment or suggestion made by counsel during the trial of this action.

Such statements, arguments, comments, or suggestions are not evidence and must not be considered by you as such. You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the Court; such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and the inferences which you may deduce therefrom and such presumptions as the law may deduce therefrom, as **[122]** stated in these instructions, and upon the law as given you in these instructions.

You must weigh*t* and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action. It is the duty of the jurors to deliberate and consult with a view to reaching an agreement, if they can do so without violence to their individual judgment upon the evidence under instructions of the Court. Each juror must decide the case for himself, but should do so only after a consideration of the case with his fellow-jurors, and he should not hesitate to change his views or opinions on the case when convinced that

they are erroneous.

The defendant then and there excepted to the following portions of said charge to the jury, to wit:

[Instructions to Which Exception was Taken by Defendant.]

1. Plaintiff's instruction No. 4, which reads as follows:

> "I instruct you that if the owner of an animal not naturally vicious, but which in fact is vicious, knows *it* vicious propensities or disposition, he is liable for an injury inflicted by it upon the person of one who is free from fault. But, in this connection, I further charge you that the knowledge of a servant to whom an animal is entrusted, of its disposition or propensities, is the knowledge of the master sufficient in law to render the latter liable, and I further instruct you that if, while in charge of the animal, the servant acquires knowledge of its disposition or propensities, then the circumstance that this knowledge was acquired after the animal was taken in charge and was not known either to the servant or to his employer at the time when the charge of the animal commenced, will not exonerate the employer from liability." **[123]**

on the ground that there being no evidence that the horse in question was vicious it was improper to submit that issue to the jury.

2. That part of instruction of No. 8 which reads as follows:

> "In order, therefore, to find a verdict for the

plaintiff you must not only find from a preponderance of all the evidence that the defendant was negligent; but also that such negligence was the proximate cause of the injury to the plaintiff; and you must further find that the evidence fails to show by a preponderance thereof that the plaintiff was guilty of negligence, however slight, contributing proximately thereto; otherwise your verdict must be for the defendant."

on the ground and for the reason that the same does not correctly state the law applicable to said case, in this: that it instructed the jury that if it found the plaintiff guilty of any contributory negligence, however slight, it must find a verdict for the defendant.

Prior to the argument of the said cause to the jury, the defendant reasonably requested the Court to give the following instructions to the jury, but the Court refused to give the said instructions, or any thereof, and to such refusal the defendant then and there duly excepted, on the grounds hereinafter set forth, as follows, to wit:

[Instructions Offered by Defendant and Refused.]

1. Instruction No. 1 so requested by defendant and reading as follows:

"You are instructed that plaintiff having failed to prove whether or not the decedent was under the provisions of the so-called Roseberry Compensation Law of this State, or whether or not the employer and employee in this case had elected to come [124] under the provi-

sions of that law, he has failed to establish a fact necessarily affecting his right to recover and he therefore cannot recover in this action."

on the ground that the said instruction correctly states the law applicable to the case, and that said instruction was not in any form given by the Court to the jury.

2. Instruction No. 2, which reads as follows:

"If the horse and cart was equipped in the usual manner that such horses and carts are equipped and with such means of control as are usual and as reasonably prudent men use, defendant was not guilty of negligence in furnishing it to its employee."

on the ground that the said instruction correctly states the law applicable to the issues of said case, and was not in any form given by the Court to the jury.

3. Instruction No. 3, which reads as follows:

"Defendant is not required to use any extraordinary or unusual means of carrying on its operations. It may use such means and instrumentalities as are usual in that line of business, and such as man of reasonable prudence ordinarily use in such business."

on the ground that the said instruction correctly states the law applicable to the case, and that said instruction was not in any form given by the Court to the jury.

4. Instruction No. 4, which reads as follows:

"Horses broken and trained to the extent that horses are usually broken and trained by men of

ordinary prudence may be used although they may be high-strung and require control. The mere fact that they will not stand alone without hitching or that they will run if frightened, or that they are restive and fret when made to stand, or otherwise balky or fractious, **[125]** does not make it negligence to use them if a reasonably prudent man would ordinarily use them under the circumstances."

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

5. Instruction No. 5, which reads as follows:

"If you find that the negligence of the decedent was of the same character or degree as the negligence of defendant, plaintiff cannot recover."

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

6. Instruction No. 6, which reads as follows:

"If you find that the negligence of the decedent was equal to that of the defendant, plaintiff cannot recover."

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

7. Instruction No. 7, which reads as follows

"In this connection you are instructed that

gross negligence is that lack of care which even a person of careless habits would observe in avoiding injury to his own person or a life under circumstances of equal or similar danger. It consists of a reckless disregard of danger."

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

8. Instruction No. 8, which reads as follows:

"In order to constitute gross negligence some degree of wilfulness is necessary. It involves recklessness, and an intent, **[126]** actual or constructive, to act irrespective of the rights of others must be shown."

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

9. Instruction No. 9, which reads as follows:

"You are instructed that plaintiff has not charged defendant with gross negligence, so that defendant cannot be held responsible if decedent was guilty of contributory negligence."

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

10. Instruction No. 10, which reads as follows

"Unless decedent used ordinary care and diligence it cannot be said that his negligence was slight."

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

11. Instruction No. 11, which reads as follows:

> "The fact that defendant has pleaded that the negligence of decedent contributed to his death cannot be taken by you as an admission by defendant that it was in any way guilty of negligence nor can it be taken as any evidence of negligence by defendant."

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

12. Instruction No. 12, which reads as follows: **[127]**

> "Damages in a case of *his* kind cannot be made vindictive to punish the defendant, nor can they be based on the sorrow, grief, or suffering which the death may cause the family of the decedent. Damages must be limited to the pecuniary loss, if any, to the heirs by the death. You are not permitted to measure the loss except so far as it was a pecuniary loss."

on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury.

[Proceedings had Relative to Allowance of Exceptions to Instructions, etc.]

All the foregoing exceptions as to instructions

given, asked and refused, are allowed under the following circumstances, to wit: Rule 22 of the United States District Court for the Southern District of California, was not followed as it is written. No exceptions were noted before the jury left the box to consider of their verdict, but the following did occur at the trial: The following stipulation was entered into in open court at the suggestion of the Judge with regard to the taking of exceptions:

The COURT.—Better have a stipulation here that the rule obtaining in the State Court shall apply here, in regard to exceptions.

Mr. TREADWELL.—I think so.

Mr. DUNNE.—Then it may be stipulated that it is not necessary for either side to take any exceptions in the course of this trial to any ruling which may be made by his Honor." (Rep. Trans., p. 22.)

After the Court charged the jury, and while the jury was still in the box, the following stipulation was entered into in **[128]** open court at the suggestion of the Court with regard to the taking of exceptions to the giving of its instructions and refusal of instructions requested:

The COURT.—The rule of court requiring exceptions to be noted at the time—it is generally the practice to waive that and allow the exceptions to be taken at a subsequent time. Will you stipulate that may be done?

Mr. DUNNE.—Yes, your Honor, if it is agreeable to counsel on the other side.

Mr. SHORT.—Yes." (Rep. Trans., p. 134.)

After the testimony was closed and the opening

argument made to the jury by counsel for plaintiff, and before the argument by counsel for defendant, the following occurred at the trial:

Mr. TREADWELL.—If your Honor please, under the peculiar practice of this Court, in addition to the motion for a nonsuit, it is necessary to make a motion, on the same grounds, to direct the verdict. I want the record to show that we made that motion.

The COURT.—All right. (Rep. Trans., p. 125.)

The Court is of the opinion that the plaintiff stipulated as shown by the foregoing, that the exceptions could be noted as taken and shown in the bill of exceptions; that this stipulation was not only between the parties, but that the Court was a party to it; that said stipulations were made in the presence of the jury and before the jury retired from the box to consider of their verdict; that said stipulations had the force and effect of exceptions noted, as required by Rule 22, in the presence of the jury; that the requirement of Rule 22, or the Statute of **[129]** Westminster II, not being a constitutional requirement, could be waived by stipulation and estoppel. The defendant objects to the insertion in the bill of exceptions of this statement containing said stipulations, and insists that the bill of exceptions should be settled and the exceptions shown without this statement. The plaintiff desires to withdraw from said stipulations, and to have said exceptions stricken out of the bill of exceptions, and the bill to state exactly what was done. The Court is of the opinion that it is in duty bound to allow

said exceptions as aforesaid, and as noted in the bill, but to state the exact facts in the bill of exceptions, as to what occurred. The Court is of the opinion that all the elements of an equitable estoppel are present here, even if the plaintiff is not bound by said stipulations. So far as the trial court ic concerned, the plaintiff is not permitted to withdraw from said stipulations. The objection of the defendant to the insertion of this statement in the bill of exceptions is overruled, and an exception is allowed the defendant to this ruling of the Court.

Thereupon the said cause was submitted to the jury and the jury retired to consider their verdict, and thereafter returned a verdict, which will be found in the judgment-roll herein, and to which verdict the defendant now duly excepts.

Thereafter, by stipulation of the parties, and order of court, the time within which the said defendant might prepare and present a bill of exceptions in said cause was duly extended to and including the 6th day of August, 1915. **[130]**

[Defendant's Specification as to Insufficiency of Evidence.]

The defendant now specifies the following particulars in which the evidence is insufficient to justify the verdict:

1. The evidence is insufficient to justify the finding that this action was brought upon behalf of the estate or the heirs of Pietro Spina.

2. The evidence is insufficient to show that the person alleged to have been killed on the first day of July, 1912, left any heirs, or that he left the wife

and child referred to in the amended complaint herein.

3. The evidence is insufficient to justify the finding that the defendant came to his death by reason of any carelessness or negligence of the defendant, its agents, employees or servants.

4. The evidence is insufficient to justify the finding that the horse furnished by defendant to Twining was restive, fractious, vicious, frisky, not easily controlled, liable to run away or a dangerous animal with which to approach the harvester team mentioned in said complaint.

5. The evidence is insufficient to justify the finding that the defendant knew that said horse was restive, fractious, vicious, frisky, not easily controlled, liable to run away or a dangerous animal with which to approach said harvester team.

6. The evidence is insufficient to justify the finding that the defendant carelessly or negligently caused or permitted said Twining to approach said harvester.

7. The evidence is insufficient to justify the finding that the said Twining did negligently or carelessly approach the said harvester.

8. The evidence is insufficient to justify the finding that the said Twining approached the said harvester or that [131] defendant permitted him to approach said harvester without any effort to manage, restrain, control or quiet said horse.

9. The evidence is insufficient to justify the finding that the said Twining failed and neglected to take proper precautions in the care or driving of said

horse to avoid the frightening of said harvester team.

10. The evidence is insufficient to justify the finding that by reason of any carelessness or negligence to defendant said horse frightened said harvester team, or caused the same to run away or to injure or kill the said Spina.

11. The evidence is insufficient to justify the finding that the defendant failed or neglected to take reasonable or proper precautions to protect decedent.

12. The evidence is insufficient to justify the finding that the defendant failed or neglected or carelessly or negligently or otherwise failed or neglected to provide proper, adequate or safe appliances or instrumentalities for the conduct of its operations.

13. The evidence is insufficient to justify the finding that the defendant carelessly or negligently or otherwise failed or neglected to supply decedent with a safe place to work.

14. The evidence is insufficient to justify the finding that the defendant carelessly or negligently or otherwise caused or permitted the said Twining to use a dangerous or frightening horse.

15. The evidence is insufficient to justify the finding that the defendant carelessly or negligently failed or neglected to provide Twining with a safe and gentle horse as would enable him to approach said harvester team without frightening it. [132]

16. The evidence is insufficient to justify the finding that any negligence or carelessness of defendant caused the injury set forth in the complaint, or that the cause of action therein alleged is based thereon.

17. The evidence is insufficient to justify the find-

ing that by reason of any carelessness or negligence of defendant plaintiff has been damaged in the sum of five thousand (5,000) dollars, or any sum.

18. The evidence is insufficient to justify the finding that plaintiff prosecutes the action for or on behalf of the wife or minor daughter of said decedent.

[Defendant's Specification of Errors at Law.]

And defendant now specifies the following errors at law, occurring at the trial and excepted to by defendant:

1. The Court erred in denying the motion for nonsuit.

2. The Court erred in denying the motion of defendant to instruct the jury to render a verdict in favor of defendant and against plaintiff.

3. The Court erred in admitting in evidence the transaction that took place near said harvester on the 27th day of June, 1912, and in overruling the defendant's objections thereto, and in denying the motion to strike the same out.

4. The Court erred in admitting in evidence the probate record in the matter of the estate of Peter Spino.

5. The Court erred in overruling the objection of defendant to the following question propounded to the witness Knight:

> "Now, you observed that horse as he was driving it on that occasion, and I will ask you what manner of horse that was in your opinion; state your opinion as to the character of that horse."

[133]

6. The Court erred in overruling the objection of

defendant to the following question propounded to the witness Knight:

"Q. Would you say that a horse of that kind—could you describe a horse of that kind as a spirited animal?

7. The Court erred in overruling defendant's objection to the following question propounded to the witness Salapi:

"Q. I wish you would describe what kind of an animal in your opinion this horse was."

8. The Court erred in giving instruction No. 4, and excepted to by defendant.

9. The Court erred in giving that part of instruction No. 8 excepted to by defendant.

10. The Court erred in refusing instruction No. 1 requested by defendant.

11. The Court erred in refusing instruction No. 2 requested by defendant.

12. The Court erred in refusing instruction No. 3 requested by defendant.

13. The Court erred in refusing instruction No. 4 requested by defendant.

14. The Court erred in refusing instruction No. 5 requested by defendant.

15. The Court erred in refusing instruction No. 6 requested by defendant.

16. The Court erred in refusing instruction No. 7 requested by defendant.

17. The Court erred in refusing instruction No. 8 requested by defendant.

18. The Court erred in refusing instruction No. 9 requested by defendant. [134]

19. The Court erred in refusing instruction No. 10 requested by defendant.

20. The Court erred in refusing instruction No. 11 requested by defendant.

21. The Court erred in refusing instruction No. 12 requested by defendant.

NOW, THEREFORE, to the end that the said proceedings may be and remain of record, said defendant presents this, its bill of exceptions, and asks that the same may be settled, approved and allowed.

EDWARD F. TREADWELL,
Attorney for Defendant Miller & Lux, Incorporated.

[Order Settling, Allowing and Approving Bill of Exceptions.]

The foregoing bill of exceptions having been duly *present* within the time allowed by law, it is hereby settled, allowed and approved.

Dated: Oct. 13th, 1915.

OSCAR A. TRIPPET,
District Judge. **[135]**

[Endorsed]: No. 42 (Civil). N. D. In the United States District Court for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli as Administrator of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased, Plaintiff, vs. Miller & Lux, Incorporated (a Corporation), Defendant. Bill of Exceptions. Filed Oct. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Edward F. Treadwell, Attorney at Law, 1323 Merchants Exchange Building, San Francisco, California. **[136]**

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO DI GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corporation),

Defendant.

Petition for Writ of Error.

Now comes Miller & Lux Incorporated (a corporation), defendants herein, and says that on or about the 18th day of May, 1915, this Court entered judgment in favor of the plaintiff and against this defendant, whereby it was adjudged that plaintiff have and recover from defendant the sum of five thousand (5,000) dollars, and in which judgment and proceedings had prior thereunto in this case, certain errors were committed to the prejudice of this defendant; all of which will appear more in detail from the assignment of errors, which is filed with this petition.

WHEREFORE this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals, in and for the Ninth Circuit, and that said defendant be permitted to prosecute the same to said last-mentioned court for

the correction of errors so complained of, and that a transcript [137] of the record, proceedings and papers in this cause, duly authenticated, may be sent to the same Circuit Court of Appeals, and that an order be made fixing the amount of the supersedeas bond which the defendant shall give and furnish upon said writ of error, and that upon the giving of said bond, all further proceedings in this court be suspended, stayed and superseded until the determination of said Writ of Error by the United States Circuit Court of Appeals, in and for said Ninth Circuit.

Dated September 7th, 1915.

EDWARD F. TREADWELL,
Attorney for Defendant.

[Endorsed]: No. 42. (Civil.) In the United States District Court in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli as Administrator, etc., Plaintiff, vs. Miller & Lux Incorporated, Defendant. Petition for Writ of Error. Filed Sept. 7, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Edward F. Treadwell, Attorney at Law, 1323 Merchants Exchange Building, San Francisco, California. [138]

In the United States District Court, in and for the Southern District of California, Southern Division.

No. 42—(CIVIL).

SAVERIO DI GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corporation),

Defendant.

Assignment of Errors.

Now comes the defendant herein, Miller & Lux, Incorporated (a corporation), and in connection with its petition for writ of error in the above-entitled case, makes the following assignment of errors, which it avers occurred upon trial of the cause and upon which it will urge its writ of error in the above-entitled action, to wit:

I.

That during the trial of said action, Morrison Knight was called as a witness on behalf of the plaintiff and was asked the following question:

"Mr. DUNNE.—Q. On the 27th of June, that first occasion when he came out, three days before Spina's death, what did Twining do on that occasion? On that day what did Twining do?

"A. He came out to the machine. He was driving a brown horse. He got out of the cart

and got in, and got in where the sack-sewer was, and I was on top of the machine, and I looked [139] up and saw his cart going around the team, and the mules started to run and I grabbed the brake and stopped them." (Rep. Trans., p. 19.)

The defendant objected to this question and answer, as being entirely immaterial to any issue in the case, which objection was overruled and the defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question, and in overruling the objection.

II.

The following question was then propounded to the said witness:

"Q. And when he got out of the cart on that occasion, then did he tie up his horse anywhere, or allow the horse to wander about?

"A. Let his horse go.

"Q. Let the horse go? As I understand your testimony, that horse got up near the mule team?

"A. Went up alongside the mules.

"Q. And then they started to run, when you got to the brake and stopped them?

"A. Yes, sir." (Rep. Trans., p. 19.)

The defendant objected to these questions and answers as being entirely immaterial to any issue in the case, and having no possible relation with anything that took place on the first day of July, when the injury occurred. That the Court erred in allowing said witness to answer said question and in overruling defendant's objection thereto.

III.

The witness was then asked this further question:

"Q. Now, when that transaction occurred,, did you say anything to Twining? "A. I did. [140]

"Q. You may state now what you said to Twining at that time?

"A. When I stopped the team, I got up on the machine where he could see me, and I says: You take care of that horse or stay out of the field. That is all I remember—yes, I remember something more.

"Q. Do you recollect anything else you said to him?

"A. Yes, I do; that he might cause a runaway and kill somebody, or some of the mules tear up the machine." (Rep. Trans., pp. 19, 20.)

Defendant objected to this question and answer, as being entirely immaterial to any issue in the case, which objection was overruled, and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial court.

IV.

The following question was then put to the said witness:

"Q. Now, when you said that to Twining, did he make any reply to you?

"A. I never heard anything.

"Q. What did he do, if anything?

"A. He got in his cart and drove off." (Rep. Trans., p. 20.)

Defendant objected to these questions and answers as being entirely immaterial to any issue in the case, which objection was overruled, and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial Court.

V.

The defendant then moved to strike out all the answers in paragraphs one, two, three and four in this assignment of errors, [141] on the grounds set forth in said paragraphs one to four, inclusive, which motion was denied by the Court, and the defendant then and there excepted to said ruling, which ruling defendant now assigns as error on the part of the Court.

VI.

Plaintiff then offered in evidence the probate record in the matter of the estate of Peter Spino, deceased, in the following words:

> "Mr. DUNNE.—If your Honor please, it is alleged in the complaint and denied in the answer, on information and belief, or lack of information and belief, that by proper proceedings had in the Superior Court of the State of California, in and for the County of Merced, the present plaintiff was duly appointed the administrator of the estate of the deceased. For the purpose of supporting that allegation in the complaint, I offer in evidence the probate record in that matter, numbered 892, in the matter of the estate of Peter Spino, deceased, filed July 16, 1912; and I understand from my friends on the

other side that there is no question about the authenticity of these papers.

"The COURT.—They may be considered exhibit—whatever it is.

"And may they be regarded as read?

"Mr. Treadwell.—Yes." (Trans., p. 61.)

The defendant objected to the offering of these probate papers in evidence on the ground that the probate proceedings were in the name of the estate of Peter Spino, *decease;* whereas the name of the decedent in this case was Pietro Spina. This objection was overruled, and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial Court. [142]

VII.

The following question was propounded to the witness Knight.

"Q. Now you observed that horse as he was driving it on that occasion, and I will ask you what manner of horse that was in your opinion. State your opinion as to the character of that horse.

"A. Well, in my opinion it was a high-life small horse. (Rep. Trans., p. 22.)

Defendant objected to this question as being incompetent, irrelevant and immaterial, calling for the conclusion of the witness, and no foundation laid for it, which objection was overruled, and the defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question and in overruling the objection.

VIII.

Said witness was then asked this further question:

"Q. Would you say that a horse of that kind—could you describe a horse of that kind as a spirited animal?

"A. My opinion, yes." (Rep. Trans., p. 23.)

Defendant objected to this question as being incompetent, irrelevant and immaterial, calling for the conclusion of the witness, and no foundation laid for it, which objection was overruled, and the defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question and in overruling the objection.

IX.

The following question was propounded to the witness Salapi:

"Q. I wish you would describe what kind of an animal in your opinion this horse was? [143]

"A. The horse in my opinion was full of life." (Rep. Trans., p. 50.)

Defendant objected to this question as being incompetent, irrelevant and immaterial, calling for the conclusion of the witness, and no foundation laid for it, which objection was overruled, and the defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question and in overruling the objection.

X.

The Court then instructed the jury as follows:

"I instruct you that if the owner of an animal not naturally vicious, but which in fact is vicious,

knows its vicious propensities or disposition, he is liable for an injury inflicted by it upon the person of one who is free from fault. But, in this connection, I further charge you that the knowledge of a servant to whom an animal is entrusted, of its disposition or propensities, is the knowledge of the master sufficient in law to render the latter liable, and I further instruct you that if, while in charge of the animal, the servant acquires knowledge of its disposition or propensities, then the circumstance that this knowledge was acquired after the animal was taken in charge and was not known either to the servant or to his employer at the time when the charge of the animal commenced, will not exonerate the employer from liability."

Defendant then and there excepted to the above instruction on the ground that there being no evidence that the horse in question was vicious, it was improper to submit that issue to the jury, and the giving of this instruction the defendant now assigns as error on the part of the trial Court. [144]

XI.

The Court then charged the jury in part as follows:

"In order, therefore, to find a verdict for the plaintiff you must not only find from a preponderance of all the evidence that the defendant was negligent; but also that such negligence was the proximate cause of the injury to the plaintiff; and you must further find that the evidence fails to show by a preponderance thereof that the plaintiff was guilty of negligence however

slight contributing proximately thereto; otherwise your verdict must be for the defendant." (Rep. Trans., p. 129.)

The defendant then and there excepted to the above part of the Court's instruction to the jury on the ground and for the reason that the same does not correctly state the law applicable to said case, in this: that it instructed the jury that if it found the plaintiff guilty of any contributory negligence, however slight, it must find a verdict for the defendant, and the defendant now assigns the giving of the above portion of the Court's charge to the jury as error on the part of the trial Court.

XII.

The defendant prior to the argument of the case to the jury seasonably requested the Court to give the following instruction to the jury; but the Court refused to give the said instruction or any part thereof:

"You are instructed that plaintiff failed to prove whether or not the decedent was under the provisions of the so-called Roseberry Compensation Law of this State, or whether or not the *mployer* and employee in this case had elected to come under the provisions of that law, he has failed to establish a fact necessarily affecting his right to recover and he therefore cannot recover in this action." [145]

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in

any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XIII.

The defendant prior to the argument of the case to the jury seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

> "If the horse and cart was equipped in the usual manner that such horses and carts are equipped and with such means of control as are usual and as reasonably prudent men use, defendant was not guilty of negligence in furnishing it to its employees."

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XIV.

The defendant prior to the argument of the case to the jury seasonably requested the Court to give the following instruction:

> "Defendant is not required to use any extraordinary or unusual means of carrying on its operations. It may use such means and instrumentalities as are usual in that line of business, and such as men of reasonable prudence ordinarily use in such business." [146]

To the refusal to give the above instruction, the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XV.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

> "Horses broken and trained to the extent that horses are usually broken and trained by men of ordinary prudence may be used although they may be high-strung and require control. The mere fact that they will not stand alone without hitching or that they will run if frightened, or that they are restive and fret when made to stand, or otherwise balky or fractious, does not make it negligence to use them if a reasonably prudent man would ordinarily use them under the circumstances."

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XVI.

The defendant prior to the argument of the case

to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof: **[147]**

> "If you find that the negligence of the decedent was of the same character or degree as the negligence of defendant, plaintiff cannot recover."

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XVII.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

> "If you find that the negligence of the decedent was equal to that of the defendant, plaintiff cannot recover."

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XVIII.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

> "In this connection you are instructed that gross negligence is that lack of care which even a person of careless [148] habits would observe in avoiding injury to his own person or a life under circumstances of equal or similar danger. It consists of a reckness disregard of danger."

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XIX.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

> "In order to constitute gross negligence some degree of wilfullness is necessary. It involves recklessness, and an intent, actual or constructive, to act irrespective of the rights of others must be shown."

To the refusal to give the above instruction the

defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XX.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

> "You are instructed that plaintiff has not charged defendant with gross negligence, so that defendant cannot be held [**149**] responsible if decedent was guilty of contributory negligence."

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XXI.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

> "Unless decedent used ordinary care and diligence it cannot be said that his negligence was slight."

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XXII.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

> "The fact that defendant has pleaded that the negligence of decedent contributed to his death cannot be taken by you as an admission by defendant that it was in any way guilty of negligence nor can it be taken as any evidence of negligence by defendant." **[150]**

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XXIII.

The defendant prior to the argument of the case to the jury, seasonably requested the Court to give the following instruction to the jury, but the Court refused to give the said instruction or any part thereof:

"Damages in a case of this kind cannot be made vindictive to punish the defendant, nor can they be based on the sorrow, grief or suffering which the death may cause the family of the decedent. Damages must be limited to the pecuniary loss, if any, to the heirs by the death. You are not permitted to measure the loss except so far as it was a pecuniary loss."

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the Court to the jury, and such refusal the defendant now assigns as error on the part of the trial Court.

XXIV.

That the District Court of the United States, in and for the Southern District of California, erred in denying the motion of the defendant for nonsuit, to which ruling the defendant then and there excepted. [151]

XXV.

The said Court erred in denying the motion of defendant to instruct the jury to render a verdict in favor of defendant and against plaintiff, to which ruling the defendant then and there excepted.

XXVI.

That the evidence is insufficient to justify the verdict in said action and defendant now specifies the following particulars in which the evidence is insufficient to justify the verdict:

1. The evidence is insufficient to justify the find-

ing that this action was brought upon behalf of the estate or the heirs of Pietro Spina.

2. The evidence is insufficient to show that the person alleged to have been killed on the first day of July, 1912, left any heirs, or that he left the wife and child referred to in the amended complaint herein.

3. The evidence is insufficient to justify the finding that the defendant came to his death by reason of any carelessness or negligence of the defendant, its agents, employees or servants.

4. The evidence is insufficient to justify the finding that the horse furnished by defendant to Twining was restive, fractious, vicious, frisky, not easily controlled, liable to run away or a dangerous animal with which to approach the harvester team mentioned in said complaint.

5. The evidence is insufficient to justify the finding that the defendant knew that said horse was restive, fractious, vicious, frisky, not easily controlled, liable to run away or a dangerous animal with which to approach said harvester team.

6. The evidence is insufficient to justify the finding that the defendant carelessly or negligently caused or permitted said Twining to approach the said harvester. [152]

7. The evidence is insufficient to justify the finding that the said Twining did negligently or carelessly approach the said harvester.

8. The evidence is insufficient to justify the finding that the said Twining approached the said harvester or that defendant permitted him to approach

said harvester without any effort to manage, restrain, control or quiet said horse.

9. The evidence is insufficient to justify the finding that the said Twining failed and neglected to take proper precautions in the care or driving of said horse to avoid the frightening of said harvester team.

10. The evidence is insufficient to justify the finding that by reason of any carelessness or negligence of defendant said horse frightened said harvester team, or caused the same to run away or to injure or kill the said Spina.

11. The evidence is insufficient to justify the finding that the defendant failed or neglected to take reasonable or proper precautions to protect decedent.

12. The evidence is insufficient to justify the finding that the defendant failed or neglected or carelessly or negligently or otherwise failed or neglected to provide proper, adequate or safe appliances or instrumentalities for the conduct of its operations.

13. The evidence is insufficient to justify the finding that the defendant carelessly or negligently or otherwise failed or neglected to supply decedent with a safe place to work.

14. The evidence is insufficient to justify the finding that the defendant carelessly or negligently or otherwise caused or permitted the said Twining to use a dangerous or frightening horse.

15. The evidence is insufficient to justify the finding that the defendant carelessly or negligently

failed or neglected [153] to provide Twining with a safe and gentle horse as would enable him to approach said harvester team without frightening it.

16. The evidence is insufficient to justify the finding that any negligence or carelessness of defendant caused the injury set forth in the complaint, or that the cause of action therein alleged is based thereon.

17. The evidence is insufficient to justify the finding that by reason of any carelessness or negligence of defendant plaintiff has been damaged in the sum of five thousand (5,000) dollars, or any sum.

18. The evidence is insufficient to justify the finding that plaintiff prosecutes the action for or on behalf of the wife or minor daughter of said decedent.

XXVII.

The jury returned a verdict in favor of plaintiff and against defendant, to which verdict the defendant thereafter duly excepted, and which verdict now assigns as error as being against law, and prays that said judgment be reversed.

EDWARD F. TREADWELL,
Attorney for Defendant.

[Endorsed]: No. 42 (Civil). In the United States District Court in and for the Southern District of California Northern Division. Saverio Di Giovanni Petrocelli as Administrator, etc., Plaintiff, vs. Miller & Lux Incorporated (a Corporation) Defendant. Assignment of Errors. Filed Sept. 7, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Edward F. Treadwell, Attorney at Law. 1323 Merchants Exchange Building, San Francisco, California. [154]

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42 (CIVIL).

SAVERIO DI GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX INCORPORATED (a Corporation),

Defendant.

Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond.

On this 7th day of September, 1915, came the defendant, by its attorney, and filed herein and presented to this Court its petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by him, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as are proper in the premises.

IN CONSIDERATION WHEREOF IT IS ORDERED and the Court hereby orders that a writ of error as prayed for in said petition be allowed and that the amount of the supersedeas bond to be

given by defendant and upon said writ of error be, and the same is hereby fixed at the sum of seven thousand five hundred (7,500) [155] dollars, and that upon the giving of said bond all further proceedings in this court be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Dated: Sept. 7th, 1915.

OSCAR A. TRIPPET,
Judge.

[Endorsed]: No. 42 (Civil). In the United States District Court, in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli as Administrator of the Estate of Pietro Spina, Sometimes Known as, etc., Plaintiff, vs. Miller & Lux Incorporated, Defendant. Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond. Filed Sept. 7, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Edward F. Treadwell, Attorney at Law. 1323 Merchants Exchange Building, San Francisco, California. [156]

[Bond on Writ of Error.]

KNOW ALL MEN BY THESE PRESENTS: That we, Miller & Lux Incorporated (a Corporation), defendant, as principal, and C. Z. Merritt and David Brown, as sureties, are held and firmly bound unto Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, in the full and just

sum of seven thousand five hundred dollars ($7,500.00), to be paid to the said Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of September in the year of our Lord one thousand nine hundred and fifteen.

WHEREAS lately at a District Court of the United States, for the Southern District of California, Northern Division, in a suit pending in said court, between Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, plaintiff, and Miller & Lux Incorporated, a corporation, defendant, a judgment was rendered against the said Miller & Lux Incorporated, and the said Miller & Lux Incorporated (a Corporation) is about to sue out a writ of error to the United States Court of Appeals, Ninth Circuit, to reverse the judgment in the aforesaid suit, and a citation directed to the said Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within thirty days after the service of said citiation. [157]

Now, the condition of the above obligation is such,

that if the said Miller & Lux Incorporated (a Corporation) shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

IN WITNESS WHEREOF, Miller & Lux Incorporated (a corporation) has caused these presents to be executed and signed by its secretary thereunto duly authorized and the parties named herein as sureties have caused their signatures to be affixed this 4th day of Septr., 1915.

MILLER & LUX INCORPORATED.

[Seal] By DAVID BROWN,
Secretary.

C. Z. MERRITT,
DAVID BROWN,

City and County of San Francisco,
State of California,—ss.

C. Z. Merritt and David Brown, being duly sworn, each for himself, deposes and says: that he is a citizen and resident of the State of California, and is worth the sum mentioned in the foregoing undertaking, exclusive of property exempt from execution, and over and above all debts and liabilities.

C. Z. MERRITT,
DAVID BROWN.

Approved:
OSCAR A. TRIPPET,
Judge.

Subscribed and sworn to before me this 4th day of September, 1915.

[Seal] JAMES MASON,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 42 (Civil). In the United States District Court, in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli as Administrator, etc., Plaintiff, vs. Miller & Lux Incorporated, Defendant. Supersedeas Bond. Filed Sept. 7, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Edward F. Treadwell, Attorney at Law. 1323 Merchants Exchange Building, San Francisco, California. [158]

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42 (CIVIL).

SAVERIO DI GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA (Sometimes Known as PETER SPINO,) Deceased,

Plaintiff,

vs.

MILLER & LUX INCORPORATED, (a Corporation),

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

The defendant hereby specifies the following papers and orders which it wishes copied in the record on the writ of error in the above-entitled suit as follows, to wit:

1. Complaint.
2. Demurrer to Complaint.
3. Substitute of Party Plaintiff.
4. Stipulation Dated April 30th, 1913, and Order Upon the Same Sustaining Demurrer to Complaint.
5. Amended Complaint.
6. Answer to Amended Complaint.
7. Verdict Dated May 18, 1915. [159]
8. Judgment.
9. Bill of Exceptions.
10. Petition for Writ of Error, Dated September 7th, 1915.
11. Assignment of Errors.
12. Bond, Dated September 4th, 1915.
13. Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond, Dated September 7th, 1915.
14. Writ of Error, Dated September 7th, 1915.
15. Citation, Dated September 7th, 1915.
16. Order, Dated September 29th, 1915, Extending Time to File Record and Docket Case.

EDWARD F. TREADWELL,
Attorney for Defendant.

[Endorsed]: No. 42 (Civil). In the United States District Court, in and for the Southern District of California. Northern Division. Saverio di Giovanni Petrocelli as Administrator, etc., Plaintiff, vs. Miller & Lux Incorporated (a Corporation), Defendant. Praecipe for Transcript of Record. Filed Nov. 24, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Edward F. Treadwell, Attorney at Law, 1323 Merchants Exchange Building, San Francisco, California. Received a Copy of the Within this 23d Day of November, 1915. M. H. Farrar, J. J. Dunne, Attorneys for Plaintiff. [160]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Southern District of California, Northern Division.

No. 42—CIVIL.

SAVERIO DI GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX INCORPORATED, (a Corporation),

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the

Southern District of California, do hereby certify the foregoing one hundred and sixty (160) typewritten pages, numbered from 1 to 160 inclusive, to be a full, true and correct copy of that part of the certified transcript of record on removal to the District Court which consists of the complaint, demurrer to complaint and certificate of county clerk, also of the order of substitution, stipulation as to demurrer and order thereon, amended complaint, answer, verdict, judgment, petition for writ of error, assignment of errors, order allowing writ of error and fixing amount of supersedeas bond, bond on writ of error, and praecipe for transcript of record on writ of error, in the above and therein entitled cause, and that the same together constitute the record in said cause, as [161] specified in the said praecipe for transcript of record on writ of error filed in my office on behalf of the plaintiff in error, by its attorney of record.

I do further certify that the cost of the foregoing record is $82.60, the amount whereof has been paid me by Miller & Lux Incorporated, a corporation, the plaintiff in error in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this 10th day of December, in the year of our Lord,

one thousand nine hundred and fifteen, and of our independence, the one hundred and fortieth.

WM. M. VAN DYKE,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By LESLIE S. COLYER,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp, Canceled 12/10/15, L. S. C.] [162]

[Endorsed]: No. 2711. United States Circuit Court of Appeals for the Ninth Circuit. Miller & Lux, Incorporated, a Corporation, Plaintiff in Error, vs. Saverio di Giovanni Petrocelli as Administrator of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Northern Division.

Filed December 20, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42 (CIVIL).

SAVERIO DI GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corporation),

Defendant.

Order Extending Time [to December 1, 1915, to File Record, etc., in U. S. Circuit Court of Appeals].

Good cause appearing therefor it is by the Court ORDERED that the defendant above named may have until and including the 1st day of December, 1915, in which to file the record on appeal and docket the case in the office of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated this 29th day of September, 1915.

OSCAR A. TRIPPET,
District Judge.

[Endorsed]: No. 42 (Civil). In the United States District Court, in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, as Administrator, etc., Plaintiff, vs. Miller & Lux, Incorporated (a Corporation), Defend-

ant. Order Extending Time. No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Dec. 1, 1915, to File Record Thereof and to Docket Case. Filed Oct. 4, 1915. F. D. Monckton, Clerk.

In the United States District Court, in and for the Southern District of California, Northern Division.

No. 42 (CIVIL).

SAVERIO DI GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Plaintiff,

vs.

MILLER & LUX, INCORPORATED (a Corporation),

Defendant.

Order Extending Time [to January 15, 1916, to File Record, etc., in U. S. Circuit Court of Appeals].

Good cause appearing therefor, it is by the Court ORDERED that the defendant above-named may have until and including the 15 day of Jan., 1916, in which to file the record on appeal and docket the case in the office of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated this 30 day of Nov., 1915.

OSCAR A. TRIPPET,
District Judge.

[Endorsed]: No. 42 (Civil). In the United States District Court, in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, as Administrator of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased, Plaintiff, vs. Miller & Lux, Incorporated (a Corporation), Defendant. Order Extending Time. No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to —— to File Record Thereof and to Docket Case. Filed Dec. 1, 1915. F. D. Monckton, Clerk.

No. 2711. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to Jan. 15, 1916, to File Record Thereof and to Docket Case. Refiled Dec. 20, 1915. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 2711.

MILLER & LUX, INCORPORATED, a Corporation,

Plaintiff in Error,

vs.

SAVERIO DI GIOVANNI PETROCELLI, as Administrator of the Estate of PIETRO SPINA, Sometimes Known as PETER SPINO, Deceased,

Defendant in Error.

Stipulation [that Certified Copy of Papers on Removal from Superior Court to U. S. District Court be Made a Part of the Record, etc.].

In the above-entitled cause, it is hereby stipulated and agreed that the annexed certified copies of the Petition, Bond, Notice and Order, upon removal from the Superior Court of the State of California, in and for the county of Merced, to the United States District Court in and for the Southern District of the State of California, be filed in the above-mentioned United States Circuit Court of Appeals for the Ninth Circuit with the clerk thereof, and become a part of the record upon the Writ of Error now pending in said Circuit Court of Appeals in the above-entitled action;

And it is hereby further stipulated that the Judges of said Circuit Court of Appeals and the parties to

the above-entitled action, may refer for all purposes to said certified copies and to each of them, as fully as if said certified copies and each of them had been incorporated and set forth at length in the transcript of record now on file in the above-entitled cause.

MILLER & LUX, INCORPORATED,
A Corporation, Plaintiff in Error.
By EDWARD A. TREADWELL,
Attorney for Said Plaintiff in Error.

Dated at San Francisco, this 29th day of January, A. D. 1916.

SAVERIO di GIOVANNI PETRO CELLI,
As Administrator of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased, Defendant in Error.
By J. J. DUNNE,
MERCER H. FARRAR,
Attorneys for Said Defendant in Error.

In the Superior Court of the State of California, in and for the County of Merced.

No. ——.

G. E. NORDGREN, as Administrator of the Estate of PETER SPINO, Deceased,
Plaintiff,

vs.

MILLER & LUX (a Corporation),
Defendant.

Petition for Removal of Cause.

To the Honorable the Superior Court of the State of California, in and for the County of Merced:

The petition of Miller & Lux, Incorporated (a Corporation) respectfully shows:

1. That petitioner is the defendant in the above-entitled action and has been served with summons therein.

2. That the above-entitled action is a suit of a civil nature, of which the District Court of the United States has original jurisdiction, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of three thousand (3,000) dollars.

3. That the time has not elapsed within which your petitioner is required by the laws of the State of California or the rules of the above-entitled court to answer or plead to the complaint of the plaintiff on file herein, and your petitioner has not heretofore appeared in said suit.

4. That said suit is a controversy wholly between citizens of different states, to wit, between plaintiff, who is and at the time of the commencement of this suit was a citizen of the State of California, and this defendant, who is and at the time of the commencement of this action was, and ever since the year 1905, has been, a corporation organized and existing under the laws of the State of Nevada, and is a resident and citizen of said State of Nevada.

5. That Jovetta Spino and Sunda Spino, the heirs at law of Peter Spino mentioned in the complaint

herein, are and each of them is a resident and subject of the Kingdom of Italy.

WHEREFORE, your petitioner petitions this Honorable Court for the removal of said suit into the District Court of the United States for the Southern District of California (Northern Division), and hereby files with this petition proof of service of notice thereof upon said plaintiff, and also files herewith a bond with good and sufficient sureties for its entering in said District Court within thirty days from the date of filing said petition a certified copy of the record in said suit and for paying all costs that may be awarded by the said District Court if said court shall hold that said suit was wrongfully or improperly removed thereto, and said petitioner prays that this Honorable Court accept said petition and bond and proceed no further in said suit, and that upon a certified copy of said record being entered as aforesaid in said District Court of the United States the cause shall then proceed in the same manner as if it had been originally commenced in said District Court.

[Seal] MILLER & LUX, INCORPORATED,
By DAVID BROWN,
Secretary.

EDWARD F. TREADWELL,
Attorney for Petitioner.

State of California,
City and County of San Francisco,—ss.

David Brown, being first duly sworn, deposes and says: That he is the secretary of petitioner in the above-entitled matter and makes this affidavit in its

behalf; that he has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge.

DAVID BROWN.

Subscribed and sworn to before me this 16th day of August, 1912.

[Seal] JAMES MASON,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 30, 1912. P. J. Thornton, Co. Clerk.

Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS: That we, the undersigned, are held and firmly bound unto G. E. Nordgren, as administrator of the estate of Peter Spino, deceased, in the sum of one thousand (1,000) dollars, lawful money of the United States, for the payment of which well and truly to be made, we jointly and severally bind ourselves and each of us firmly by these presents.

Signed and sealed by me this 16th day of August, A. D. 1912.

The condition of the foregoing obligation is such that

WHEREAS, Miller & Lux, Incorporated, is about to file with the Superior Court of the State of California, in and for the county of Merced, a petition for the removal of a suit pending therein brought by said G. E. Nordgren, as administrator of the estate of Peter Spino, deceased, entitled "G. E. Nordgren, as administrator of the estate of Peter

Service and receipt of a copy of the above notice is hereby admitted this 29th day of August, 1912.

HENRY BRICKLEY and
L. J. SCHINO,
J. J. GRIFFIN,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 30th, 1912. P. J. Thornton, Co. Clerk.

In the Superior Court of the State of California, in and for the County of Merced.

No. ——.

G. E. NORDGREN, as Administrator of the Estate of PETER SPINO, Deceased,
Plaintiff,

vs.

MILLER & LUX (a Corporation),
Defendant.

Order of Removal.

This cause coming on for hearing upon application of the defendant, Miller & Lux, Incorporated, herein for an order transferring this cause to the United States District Court for the Southern District of California (Northern Division), and it appearing to the Court that the defendant, Miller & Lux, Incorporated (a corporation) has filed its petition for such removal in due form of law, and within the time required by law and has filed with said petition due proof of service of written notice of filing the same upon the attorneys for the plaintiff in said action prior to the filing of said petition, and that said de-

fendant has filed its bond duly conditioned, with good and sufficient sureties, as provided by law, and it appearing to the Court that this is a proper cause for removal to said District Court,

Now, therefore, it is hereby ordered and adjudged that this cause be and it hereby is removed to the United States District Court for the Southern District of California (Northern Division), and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith,

Done in open court this 30th day of August, 1912.

E. N. RECTOR,
Judge.

[Endorsed]: Filed Aug. 30, 1912. P. J. Thornton, Co. Clerk.

(Endorsement on Certified Transcript of Record filed in U. S. District Court, of which the preceding Petition, Bond, Notice and Order are a portion.)

No. 42—Civil. U. S. District Court, Southern District of California, Northern Division. G. E. Nordgren, as Administrator, etc, vs. Miller & Lux, a Corp. Certified Transcript of Record on Removal from Superior Court of Merced County. Filed Sep. 14, 1912. Wm. M. Van Dyke, Clerk. By Murray C. White, Deputy Clerk.

[Certificate of Clerk U. S. District Court to Transcript of Certain Papers on Removal of Cause from Superior Court to U. S. District Court.]

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the

Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of that portion of the certified transcript of record on removal from the Superior Court of the State of California, in and for the county of Merced, filed in my office on the 14th day of September, 1912, in the case of Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, substituted for G. E. Nordgren, as administrator of the estate of Peter Spino, deceased, Plaintiff, vs. Miller & Lux, a corporation, Defendant, No. 42 Civil, Northern Division, which consists of the Petition for Removal of Cause, Bond on Removal, Notice of Filing of Petition for Removal of Cause, and Order of Removal, as the same appear of record in said Certified Transcript of Record on Removal, on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 15th day of January, A. D. 1916.

[Seal] WM. M. VAN DYKE,
Clerk.
By Leslie S. Colyer,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled 1/15/16. L. S. C.]

No. 42—Civil. United States District Court, Southern District of California, Northern Division. Saverio Di Giovanni Petrocelli, as Administrator, etc., Plaintiff, vs. Miller & Lux, Inc., a Corporation, Defendant. Certified Copy Portion of Certified Transcript of Record on Removal.

[Endorsed]: No. 2711. In the United States Circuit Court of Appeals for the Ninth Circuit. Miller & Lux, Incorporated, a Corporation, Plaintiff in Error, vs. Saverio di Giovanni Petrocelli, as Administrator of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased, Defendant in Error. Stipulation. Filed Feb. 1, 1916. F. D. Monckton, Clerk.

No. 2711

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILLER & LUX INCORPORATED
(a corporation),
Plaintiff in Error,

vs.

SAVERIO DI GIOVANNI PETROCELLI, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD F. TREADWELL,
Attorney for Plaintiff in Error.

Filed this.....day of January, 1916.

Filed
JAN 26 1916

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

F. D. Monckton,
Clerk.

PERNAU PUBLISHING COMPANY

No. 2711

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILLER & LUX INCORPORATED
(a corporation),
Plaintiff in Error,

vs.

SAVERIO DI GIOVANNI PETROCELLI, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This action was originally brought in the Superior Court of the State of California, in and for Merced County, by G. E. Nordgren, as administrator of the estate of Peter Spino, in behalf of his heirs alleged to be Jovetta Spino and Sunda Spino, to recover damages for the death of Peter Spino, alleged to have been caused on the first day of July, 1912, by the running away of a harvester team driven by him (Rec. p. 6).

The defendant caused the case to be removed into the United States District Court on a petition alleging that

the defendant was a citizen of Nevada and the said heirs to Spino were subjects of the Kingdom of Italy. A demurrer to the original complaint was sustained (Rec. p. 16). Later the court substituted as plaintiff Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, and he filed an amended complaint on behalf of Giuditta di Giovanni Petrocelli Spina and Assunta Spina (Rec. p. 17). The amended complaint does not allege the citizenship of either the plaintiff or the heirs on whose behalf the suit was brought. The amended complaint alleged in substance that the decedent was engaged as a driver on a harvester team composed of thirty-two mules; that a sack-counter named Twining approached the mule team with a horse, which frightened the mule team and caused it to run, causing the decedent to fall, resulting in his death. The admitted fact is that he drove in a horse and cart alongside of the harvester, and that the horse attached to the cart ran away and scared the mule team, which likewise ran away, and the decedent fell and was killed.

Three claims of negligence are alleged in the complaint: First, that the horse supplied Twining was in fact a vicious horse, and known by the defendant to be vicious; second, in failing and neglecting to provide the decedent with a safe place to work; and, third, that Twining approached the team without any effort to manage, restrain, control or quiet his horse, or to take any precaution or care in driving it to avoid the frightening of the harvester team. The answer (Rec. p. 25) denied these allegations, and also pleaded contributory

negligence on the part of the decedent, in that he took no proper care or precaution to control his team or to prevent the same from running away, and took no proper care to hold himself on the seat, but carelessly lost control of the team and dropped or fell from the harvester.

It should be noted that the accident occurred after the passage of the Roseberry Act, which contained the following provision as to contributory negligence:

> "Section 1. In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee." (Stats. of Cal. 1911, p. 796.)

The case was first tried before Judge Farrington, sitting with a jury, and resulted in a verdict in favor of plaintiff (Rec. pp. 34-5), which was set aside by Judge Farrington on the ground that no negligence whatever was proved, and Twining's horse having run away while he was in the cart holding the lines, there could be no presumption of negligence. A copy of his opinion is attached as an appendix hereto.

The case was again tried before Judge Trippet, and a jury, and resulted in a like verdict in favor of plaintiff, from which this writ of error is prosecuted.

On the conclusion of plaintiff's case, the defendant moved for a nonsuit (Rec. pp. 85-86), which was denied, and at the conclusion of the case defendant moved for an instructed verdict in favor of defendant, which was likewise denied (Rec. p. 114). During the trial, the court permitted evidence to be given as to certain alleged negligent conduct of Twining, occurring four days before the occasion of the death of the decedent, submitted the case to the jury under the law of negligence and an instruction regarding the liability for using a vicious animal (Instruction No. 4, p. 123), and the common-law instruction as to contributory negligence (Instruction No. 8, pp. 123-4), refused all of the requested instructions by defendant as to the effect of contributory negligence under the Roseberry Act (Instructions 5, 6, 7, 8, 9, 10 and 11, Rec. pp. 126-8), and as to the proper measure of damages (Instructions No. 12, p. 128).

Questions Presented and Assignment of Errors.

The principal contentions to be presented to this court are as follows:

1. That no evidence whatever was introduced showing that the defendant was negligent in any way, or that the horse was vicious, or known to be vicious, or that a safe place was not provided for the decedent, or that Twining was negligent in the handling of the horse.

2. That plaintiff made no case for the reason that he was not proved to be the duly appointed, qualified and acting administrator of the estate of the decedent, for the reason that the order appointing him required him to file a bond, as required by law (Rec., p. 78), and the bond given by him (Rec., p. 81) was not the bond required by law, and was void on its face.

3. That plaintiff was not entitled to recover for the reason that there was no evidence introduced showing that the person who was killed was the husband of the alleged widow, Giuditta di Giovanni Petrocelli Spina, or the father of the alleged child, Assunta Spina, in this that the action was originally brought by the administrator of Peter Spino and later the administrator of the estate of Pietro Spina, sometimes known as Peter Spino, was substituted, but no evidence was introduced that the man who died was the same person as the Pietro Spina who was married in Italy thirteen years before, or that the witness Giuditta Petrocelli was the same person as the alleged widow Giuditta di Giovanni Petrocelli Spina. The only testimony in the record is that on page 85, and it in no way connects the two men.

4. That the record fails to show that the district court had any jurisdiction of the case made by the amended complaint, and for that reason the judgment should be reversed.

5. That the court erred in permitting evidence to be introduced as to an alleged act of negligence of Twining on an entirely different occasion.

6. That the court erred in submitting to the jury the law as to the liability of keeping a vicious animal when there is no evidence that the animal was vicious.

7. That the court erred in refusing to instruct the jury as to the effect of contributory negligence as laid down by the Roseberry Act, and in giving the common law instruction on that subject.

8. That the court erred in refusing the requested instruction as to the measure of damages.

9. The court erred in refusing the requested instruction as to the necessity of plaintiff showing whether he was under the Roseberry Compensation Law, and for the same reason plaintiff failed to prove a case.

The following are the formal assignment of errors contained in the record (pp. 139-156) on which appellant relies:

"I.

That during the trial of said action, Morrison Knight was called as a witness on behalf of the plaintiff and was asked the following question:

'Mr. DUNNE. Q. On the 27th of June. that first occasion when he came out, three days before Spina's death, what did Twining do on that occasion? On that day what did Twining do?

A. He came out to the machine. He was driving a brown horse. He got out of the cart and got in, and got in where the sack-sewer was, and I was on top of the machine, and I looked up and saw his cart going around the team, and the mules started to run and I grabbed the brake and stopped them.' (Rec. p. 39.)

The defendant objected to this question and answer, as being entirely immaterial to any issue in the case, which objection was overruled and the

defendant then and there excepted thereto. That the court erred in allowing said witness to answer said question, and in overruling the objection.

II.

The following question was then propounded to the said witness:

'Q. And when he got out of the cart on that occasion, then did he tie up his horse anywhere, or allow the horse to wander about?

A. Let his horse go.

Q. Let the horse go? As I understand your testimony, that horse got up near the mule team?

A. Went up alongside the mules.

Q. And then they started to run, when you got to the brake and stopped them?

A. Yes, sir.' (Rec. p. 40.)

The defendant objected to these questions and answers as being entirely immaterial to any issue in the case, and having no possible relation with anything that took place on the first day of July, when the injury occurred. That the court erred in allowing said witness to answer said question and in overruling defendant's objection thereto.

III.

The witness was then asked this further question:

'Q. Now, when that transaction occurred, did you say anything to Twining? A. I did.

Q. You may state now what you said to Twining at that time?

A. When I stopped the team, I got up on the machine where he could see me, and I says: You take care of that horse or stay out of the field. That is all I remember—yes, I remember something more.

Q. Do you recollect anything else you said to him?

A. Yes, I do; that he might cause a runaway and kill somebody, or some of the mules tear up the machine.' (Rec. p. 40.)

Defendant objected to this question and answer, as being entirely immaterial to any issue in the case, which objection was overruled, and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial court.

IV.

The following question was then put to the said witness:

'Q. Now, when you said that to Twining, did he make any reply to you?

A. I never heard anything.

Q. What did he do, if anything?

A. He got in his cart and drove off.' (Rec. p. 40.)

Defendant objected to these questions and answers as being entirely immaterial to any issue in the case, which objection was overruled and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial court.

VI.

Plaintiff then offered in evidence the probate record in the matter of the estate of Peter Spino, deceased, in the following words:

'Mr. Dunne. If your Honor please, it is alleged in the complaint and denied in the answer, on information and belief, or lack of information and belief, that by proper proceedings had in the Superior Court of the State of California, in and for the County of Merced, the present plaintiff was duly appointed the administrator of the estate of the deceased. For the purpose of supporting that allegation in the complaint, I offer in evidence the probate record in that matter, numbered 892, in the matter of the estate of Peter Spino, deceased, filed July 16, 1912; and I understand from my friends on the other side that there is no question about the authenticity of these papers.

The Court. They may be considered exhibit—whatever it is.

And may they be regarded as read?

Mr. Treadwell. Yes.' (Rec. p. 55.)

The defendant objected to the offering of these probate papers in evidence on the ground that the probate proceedings were in the name of the estate of Peter Spino, *deceased;* whereas the name of the decedent in this case was Pietro Spina. This objection was overruled, and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial court.

VII.

The following question was propounded to the witness Knight.

'Q. Now you observed that horse as he was driving it on that occasion, and I will ask you what manner of horse that was in your opinion. State your opinion as to the character of that horse.

A. Well, in my opinion it was a high-life small horse.' (Rec. p. 41.)

Defendant objected to this question as being incompetent, irrelevant and immaterial, calling for the conclusion of the witness, and no foundation laid for it, which objection was overruled, and the defendant then and there excepted thereto. That the court erred in allowing said witness to answer said question and in overruling the objection.

VIII.

Said witness was then asked this further question:

'Q. Would you say that a horse of that kind—could you describe a horse of that kind as a spirited animal?

A. My opinion, yes.' (Rec. p. 41.)

Defendant objected to this question as being incompetent, irrelevant and immaterial, calling for the conclusion of the witness, and no foundation laid for it, which objection was overruled, and the defendant then and there excepted thereto. That the court erred in allowing said witness to answer said question and in overruling the objection.

IX.

The following question was propounded to the witness Salapi:

'Q. I wish you would describe what kind of an animal in your opinion this horse was?

A. The horse in my opinion was full of life.' (Rec. pp. 49-50.)

Defendant objected to this question as being incompetent, irrelevant and immaterial, calling for the conclusion of the witness, and no foundation laid for it, which objection was overruled, and the defendant then and there excepted thereto. That the court erred in allowing said witness to answer said question and in overruling the objection.

X.

The court then instructed the jury as follows:

'I instruct you that if the owner of an animal not naturally vicious, but which in fact is vicious, knows its vicious propensities or disposition, he is liable for an injury inflicted by it upon the person of one who is free from fault. But, in this connection, I further charge you that the knowledge of a servant to whom an animal is entrusted, of its disposition or propensities, is the knowledge of the master sufficient in law to render the latter liable, and I further instruct you that if, while in charge of the animal, the servant acquires knowledge of its disposition or propensities, then the circumstance that this knowledge was acquired after the animal was taken in charge and was not known either to the servant or to his employer at the time when the charge of the animal commenced, will not exonerate the employer from liability.' (Rec. p. 115.)

Defendant then and there excepted to the above instruction on the ground that there being no evidence that the horse in question was vicious, it was improper to submit that issue to the jury, and the giving of this instruction the defendant now assigns as error on the part of the trial court.

XI.

The court then charged the jury in part as follows:

'In order, therefore, to find a verdict for the plaintiff you must not only find from a preponderance of all the evidence that the defendant was negligent, but also that such negligence was the proximate cause of the injury to the plaintiff; and you must further find that the evidence fails to show by a preponderance thereof that the plaintiff was guilty of negligence however slight contributing proximately thereto; otherwise your verdict must be for the defendant.' (Rec. p. 118.)

The defendant then and there excepted to the above part of the court's instruction to the jury on the ground and for the reason that the same does not correctly state the law applicable to said case, in this: that it instructed the jury that if it found the plaintiff guilty of any contributory negligence, however slight, it must find a verdict for the defendant, and the defendant now assigns the giving of the above portion of the court's charge to the jury as error on the part of the trial court.

XII.

The defendant prior to the argument of the case to the jury seasonably requested the court to give the following instruction to the jury; but the court refused to give the said instruction or any part thereof:

'You are instructed that plaintiff failed to prove whether or not the decedent was under the provisions of the so-called Roseberry Compensation Law of this State, or whether or not the employer and employee in this case had elected to come under the provisions of that law, he has failed to establish a fact necessarily affecting his right to recover and he therefore cannot recover in this action.' (Rec. p. 124.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the

law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XVI.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'If you find that the negligence of the decedent was of the same character or degree as the negligence of defendant, plaintiff cannot recover.' (Rec. p. 126.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XVII.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'If you find that the negligence of the decedent was equal to that of the defendant, plaintiff cannot recover.' (Rec. p. 126.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XVIII.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give

the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'In this connection you are instructed that gross negligence is that lack of care which even a person of careless habits would observe in avoiding injury to his own person or a life under circumstances of equal or similar danger. It consists of a reckless disregard of danger.' (Rec. pp. 126-7.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XIX.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'In order to constitute gross negligence some degree of wilfullness is necessary. It involves recklessness, and an intent, actual or constructive, to act irrespective of the rights of others must be shown.' (Rec. p. 127.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XX.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'You are instructed that plaintiff has not charged defendant with gross negligence, so that defendant cannot be held responsible if decedent was guilty of contributory negligence.' (Rec. p. 127.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XXI.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'Unless decedent used ordinary care and diligence it cannot be said that his negligence was slight.' (Rec. p. 127.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XXII.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'The fact that defendant has pleaded that the negligence of decedent contributed to his death cannot be taken by you as an admission by defendant that it was in any way guilty of negligence nor can it be taken as any evidence of negligence by defendant.' (Rec. p. 128.)

To the refusal to give the above instruction the defendant then and there duly excepted on the

ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XXIII.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'Damages in a case of this kind cannot be made vindictive to punish the defendant, nor can they be based on the sorrow, grief or suffering which the death may cause the family of the decedent. Damages must be limited to the pecuniary loss, if any, to the heirs by the death. You are not permitted to measure the loss except so far as it was a pecuniary loss.' (Rec. p. 127.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XXIV.

That the District Court of the United States, in and for the Southern District of California, erred in denying the motion of the defendant for nonsuit, to which ruling the defendant then and there excepted. (Rec. p. 85.)

XXV.

The said court erred in denying the motion of defendant to instruct the jury to render a verdict in favor of defendant and against plaintiff, to which ruling the defendant then and there excepted. (Rec. p. 114.)

XXVI.

That the evidence is insufficient to justify the verdict in said action and defendant now specifies the following particulars in which the evidence is insufficient to justify the verdict:

1. The evidence is insufficient to justify the finding that this action was brought upon behalf of the estate or the heirs of Pietro Spina.

2. The evidence is insufficient to show that the person alleged to have been killed on the first day of July, 1912, left any heirs, or that he left the wife and child referred to in the amended complaint herein.

3. The evidence is insufficient to justify the finding that the defendant came to his death by reason of any carelessness or negligence of the defendant, its agents, employees or servants.

4. The evidence is insufficient to justify the finding that the horse furnished by defendant to Twining was restive, fractious, vicious, frisky, not easily controlled, liable to run away or a dangerous animal with which to approach the harvester team mentioned in said complaint.

5. The evidence is insufficient to justify the finding that the defendant knew that said horse was restive, fractious, vicious, frisky, not easily controlled, liable to run away or a dangerous animal with which to approach said harvester team.

6. The evidence is insufficient to justify the finding that the defendant carelessly or negligently caused or permitted said Twining to approach the said harvester.

7. The evidence is insufficient to justify the finding that the said Twining did negligently or carelessly approach the said harvester.

8. The evidence is insufficient to justify the finding that the said Twining approached the said harvester or that defendant permitted him to approach said harvester without any effort to manage, restrain, control or quiet said horse.

9. The evidence is insufficient to justify the finding that the said Twining failed and neglected to take proper precautions in the care or driving of said horse to avoid the frightening of said harvester team.

10. The evidence is insufficient to justify the finding that by reason of any carelessness or negligence of defendant said horse frightened said harvester team, or caused the same to run away or to injure or kill the said Spina.

11. The evidence is insufficient to justify the finding that the defendant failed or neglected to take reasonable or proper precautions to protect decedent.

12. The evidence is insufficient to justify the finding that the defendant failed or neglected or carelessly or negligently or otherwise failed or neglected to provide proper, adequate or safe appliances or instrumentalities for the conduct of its operations.

13. The evidence is insufficient to justify the finding that the defendant carelessly or negligently or otherwise failed or neglected to supply decedent with a safe place to work.

14. The evidence is insufficient to justify the finding that the defendant carelessly or negligently or otherwise caused or permitted the said Twining to use a dangerous or frightening horse.

15. The evidence is insufficient to justify the finding that the defendant carelessly or negligently failed or neglected to provide Twining with a safe and gentle horse as would enable him to approach said harvester team without frightening it.

16. The evidence is insufficient to justify the finding that any negligence or carelessness of defendant caused the injury set forth in the complaint, or that the cause of action therein alleged is based thereon.

17. The evidence is insufficient to justify the finding that by reason of any carelessness or negligence of defendant plaintiff has been damaged in

the sum of five thousand (5,000) dollars, or any sum.

18. The evidence is insufficient to justify the finding that plaintiff prosecutes the action for or on behalf of the wife or minor daughter of said decedent."

Argument.

I.

THERE IS NO EVIDENCE SHOWING THAT THE HORSE DRIVEN BY TWINING WAS VICIOUS OR KNOWN TO BE VICIOUS, OR THAT THE DECEDENT WAS NOT PROVIDED WITH A SAFE PLACE TO WORK, OR THAT TWINING WAS IN ANY WAY NEGLIGENT IN THE HANDLING OR CONTROL OF THE HORSE.

(1) Defendant supplied decedent with a safe place to work.

So far as supplying the decedent with a safe place to work is concerned, it appears that he was working on a standard Holt harvester. The harvester is equipped with three (3) brakes, one handled by the foreman, one by the sack sewer, and one by the driver (Rec. p. 47). The driver is also supplied with lines to control the direction of the mules (Rec. pp. 47-8). This form of harvester is the form generally used throughout the valley and throughout the state in harvesting grain (Rec. p. 87). The driver's seat is situated over the wheel horses (Rec. p. 87), reached by a ladder and the driver is provided with a place to support his feet, and also provided with a brake and lines (Rec. p. 87). The team can be controlled with the lines (Rec. p. 88), and it is impossible for the team to run any great distance if the brakes are set (Rec. p. 89).

As the court ruled on the trial that the "inquiry on this subject is limited as to whether that is the usual and ordinary way of construction and operation of the machine" (Rec. p. 89), it is clear that nothing further need be said on this subject, as the place where he was given to work was the ordinary, usual and customary place given to the driver of a harvester.

(2) There is no evidence that the Twining horse was vicious, or known to be such. On the contrary, the evidence shows it was not vicious.

D. W. Wallis, superintendent of defendant, testified that he was familiar with the horse in question; that it was six or seven years old; that it had been on the ranches two or three years, and the painters had been using it. He had never heard of its being vicious, and knew that the horse was driven by the painters, and then was driven by the boy to the machines, and was afterwards driven by Mr. Miller, the foreman; that he never knew of the horse being vicious, fractious, or liable to run away, or anything of that kind. The horse had "good life", but would stand around without being hitched or tied up (Rec. p. 88).

The witness *C. K. Safford,* foreman of defendant, testified that he had known the horse for seven or eight years, and that it had been in the use of the company during all of that time. He had it himself at the Henderson place, and it was also around the Canal Farm at Los Banos. The irrigators used it on the Henderson place in a cart. It was a small mare; did

not weigh over eight hundred and fifty pounds; generally used single, but worked both single and double. They used to let it stand around without hitching. He never knew of its being vicious or unmanageable, or anything of that kind (Rec. pp. 92-3).

B. M. McSwain testified that he was the painter who used the horse, and had known it about six months before the accident. He had it attached to the cart and drove it from place to place; that it was "high life" to start out with, but after you drove it he could get out and let it stand any place; he could get right out and throw the lines down, or over the back of the seat, and it would not run away. He never knew anything vicious or unmanageable about the horse. By "high life" he meant a horse that would be right up and coming when you slapped her with the lines and would move along in good shape. She would start in good and fast if you wanted her to. She was a light horse and he drove her over county roads and passed automobiles. She shied a little at first when taken right out of the field, but it did not amount to anything, and after a while she took to the automobiles all right (Rec. pp. 96-7).

The witness *Knight* never had seen the horse prior to the day in question (Rec. p. 46). He testified that in his opinion it was a "high life" small horse and a spirited animal (Rec. p. 41).

The witness *Salapi* testified that the horse was in his opinion full of life (Rec. p. 50). He never saw the horse prior to the day in question.

It is very clear from this that the horse was in every way an ordinary driving mare, and in no way had the characteristics of a vicious horse, within the meaning of the rule that makes an owner absolutely liable for any injury done by such an animal, unless it be the contention of appellee that a "live" horse as distinguished from a "dead" horse is of that character.

(3) There is no evidence that Twining was negligent in the handling or control of the horse.

At the time of the accident the harvester was driven by Spino and was under the control of one Knight, the sack-tender Albano was on the left side of the machine, and the header-tender Salapi was on the right side of the machine. Besides these men, there was a man on the machine named Trainor, who subsequently died before the trial. Albano testified at the first trial but died before the second trial, and his testimony on the first trial was read in evidence at the second trial. The four witnesses, therefore, to the occurrence were Albano, Salapi and Knight, called by plaintiff, and Twining, called by the defendant.

Before taking up the testimony of these witnesses in detail, it may be said that the evidence showed that Twining drove in the cart from the rear along the left-hand side of the harvester for the purpose of getting a report as to the number of sacks. He walked his horse alongside of the harvester and Trainor got off of the harvester and went toward the cart, but before he got there the horse attached to the cart ran away, passing the harvester and along side of the mule team, the mule

team then ran and as the machine went over a check, the decedent was killed. Twining was in the cart all the time, so there was no presumption of negligence, and the only question is as to whether there was any evidence of negligence (*Rowe v. Such,* 134 Cal. 573). For the purpose of showing that there not only was no evidence of negligence, but on the contrary a clear showing that Twining did everything possible to control the horse, we now proceed to state the evidence of each of the witnesses.

The witness *Albano,* who was on the same side of the machine as Twining in the cart, testified as follows:

> "I seen that boy in the cart when he first came up to the harvester. He came up to get the number of sacks. Mr. Trainor got off the harvester and went out to the cart to give him the number of sacks. Mr. Trainor was not at the cart when the horse that was on the cart began to run away. He was on the ground quite a ways off from the cart. He went up to the cart after he got off of the harvester. *The boy was in the cart all the time.* I did not notice when the horse and cart first began to run,—not when they started. After the horse started to run the mule team started to run away also.
>
> * * * * * * *
>
> When I first saw the boy with the horse and cart he was pretty close to the machine. I was sack-tender and was on the left side. The horse and cart was also on the left side of the harvester going the same direction as the harvester. At that time it was running pretty fast. The boy in the cart was counting the sacks. At the time when the horse and cart were going pretty fast the boy was holding the horse.
>
> Q. *Show us how he was holding the horse, how were his arms, describe his arms?*

A. *He was holding the horse pretty strong.*

Q. *Show us what position his arms were in at that time?* A. (*Witness illustrates.*)

Mr. DUNNE. *I would like the reporter's notes to show that the witness extended his arms full length.*" (Rec. pp. 36 and 37.)

It will be seen from this testimony that the witness saw the horse while it was still "pretty close to the machine" and "on the left side of the harvester", and at that time the driver had hold of the lines holding the horse, and with his arms extended full length. This shows conclusively that while he was in the cart driving the horse at a walk alongside of the harvester, as testified to by other witnesses, he had such control of the lines that when the horse started to run, *and before it got past the machine* he was holding the horse pretty strong, with his arms extended their full length.

The witness *Knight* testified as follows:

"I saw Mr. Twining after he arrived at the harvester in the cart. He was probably twenty feet off from the harvester. He came in right to the back of the machine and made a couple of circles, and pulled up alongside. He came in, not to the back of the machine; he came from the south to the back of the machine. The machine was going west. He came in on a sort of angle, made a couple of circles, close to the back of the machine and went in alongside. The harvester was moving at that time. The mules were going at a slow walk. *When he came alongside there at the place where I saw him his horse was walking; his horse was walking the last I saw of him.* I first went to the brake when he was making those circles around the machine when he came up. I was at the brake by the time he got walking alongside of it. *I looked to see where he was and I saw him*

right alongside the machine, and I thought everything was all right. I thought there was no danger of any kind, and went back to the back of the machine and left the brake temporarily and thought it was perfectly safe to do so. * * * The cart is arranged to put the feet in the bottom of the cart on a slant in front of the driver. It is a form of cart that is very frequently used in that country. It is not customary to have what is generally called a dashboard on a cart.

When Mr. Twining approached I went to the brake. It is the usual thing I do when anybody approaches the harvester. There was nothing unusual in that at all. I saw Twining *after he quieted his horse down.* I was not able to see him all the time from the time he came over and got his horse quieted down until I afterwards saw the horse running away. There was a part of the time when I was on the opposite side of the machine, and therefore could not see Mr. Twining on the cart. In fact, that was the condition of things when his horse started to run. Mr. Twining's horse had run about midway of the team when I first saw it, when the team was running. His horse ran about two hundred yards before he got control of it. * * * At the time Twining's horse and cart got alongside the harvester, when the harvester was going west, and the horse walking, *Twining's horse was walking.* When the mule team was walking *and Twining's horse was walking* the distance between the harvester and the cart was probably twenty feet. *When he got alongside the harvester in the position and under the circumstances I have described, I thought everything was all right* and I saw a check and I went down to the brake. When I got down to the brake at that time, I could not see Twining or Trainor, my view was obstructed by the cleaner." (Rec. pp. 42-47.)

It is clear, therefore, from the testimony of this witness that after Twining drove his cart up along-

side of the harvester, he was walking his horse in an ordinary and proper manner; that the witness "thought everything was all right" and "thought there was no danger of any kind." It will be noted that this witness did not see the Twining horse at the exact moment it started to run, neither did Albano (Rec. p. 37).

The testimony of the third witness, *Salapi,* at both trials is in the record and we will therefore first present his testimony at the first trial. On the first trial he testified as follows:

> "Q. Now, tell us plainly and clearly all that you saw of that matter.
>
> A. I see—What I see, I see the cart coming pretty fast and we was there close to a big, high levee. Well, when this cart was going by, the mules started to run.
>
> * * * * * * *
>
> Q. Now, when you *first* saw this horse and cart where was it with reference to the harvester?
>
> A. Well, five or six steps from the harvester.
>
> Q. In what direction was it going at that time?
>
> A. It was going the same direction of the harvester team.
>
> Q. At what rate of speed, as nearly as you can describe it?
>
> A. It was going pretty fast, but I can't tell how fast it was going.
>
> Q. *Did you notice the boy that was driving the horse and cart at that time?* A. *Yes, sir.*
>
> Q. *What was his position in the cart at that time?*
>
> A. *He was holding the horse all he could, but it run away.*
>
> Q. And when you *first* saw this horse and cart, state whether it was abreast of the harvester or abreast of the mule team. Just at the point of time when you *first* saw the horse and cart was it

abreast of the harvester or abreast of the mule team —perhaps a simple word would be alongside—alongside the harvester or alongside the mule team when you *first* saw them?

A. First when I saw it, it was near the harvester, and he passed by.'' (Rec. pp. 53-54.)

It will be noted from this testimony that this witness was on the right-hand side of the harvester, while the horse and cart was on the left, and when he first saw the horse and cart it had already started to run. It was only five or six steps from the harvester at the time, and at that time ''Twining was holding the horse all he could, but it ran away''. The witness gave no testimony at the first trial whatever as to noticing the horse and cart before it began to run away, or how Twining was holding the horse, or anything of that kind, at the time it started to run away. On the contrary, he testified that the first time he saw the horse it had already started to run. It will be noted that the witnesses Albano and Knight had already testified that they did not see the cart at the time the horse started to run. On the second trial the witness Salapi attempted to supply this missing link, and testified as follows:

''Shortly before Spina was killed I saw a boy in a cart come near the harvester. The boy was in a cart. It was a small cart. It had no brakes. It had two wheels. * * * When he got near the harvester he was about five or six steps away. At that time when the boy was there alongside the harvester and five or six steps from it *his horse was going slowly.* * * *

Q. When the horse was there alongside the harvester and was walking, as you have described it, how fast were the mules going at that time?

The mules were walking also; both the mules and the horse and cart were walking straight in the same direction. At that time while those things were so, I saw Mr. Trainor; he jumps off the harvester. He moves about two steps near the cart. I see the boy in the cart at that time. He was looking to Billy Trainor. I saw that he was talking. I could not hear the words that they said, because the harvester was making a noise. The lines from the boy's horse were lying on top, loose, on top of the single-trees. *He had the ends of the lines, the extreme ends, the tips, in his left hand.* He was making motions to Billy Trainor with his right hand. *His left hand that held the tips of the lines was laying on his left knee at the time he was making these motions to Trainor.* While that was so the horse ran at once directly to the team. When the horse reached the mules and got alongside of the mules the mules ran away, right straight ahead. The horse runs alongside the team about seventy feet and then turns to the left. The mule team ran on the right side as far as the ditch. They were stopped there. *When the boy's horse started to run I saw him get hold of the line with both hands and try to hold the horse.* * * *

Q. After Twining came up in the cart and his horse was walking alongside of the machine, how far did he walk along that way? How far did the horse and cart go along walking?

A. About 20 or 30 steps." (Rec. pp. 49-52.)

Taking this testimony at its face value and disregarding any conflict between it and his previous testimony, it clearly appears that Twining brought his horse to a walk alongside of the machine; that he remained in the cart and held the lines in his left hand, the left hand resting on his knee, which would be the natural way to hold the lines while he was waiting to receive the number of sacks from the man who was approaching

the cart, and immediately the horse started to run he took the lines in both hands and tried to hold the horse.

This is all of the testimony on this subject, except the testimony of *Twining* himself, which is not materially different. He testified as follows:

> "When I came up to the harvester on the left-hand side; the harvester goes along very slowly and my horse was walking. My horse was going just about the same as the harvester. When I came up to the machine I was driving the horse. I had the lines in my hand when I came up there. I drove up to the side of the harvester, and I had the lines in my hand, and I believe that I changed them to my left hand and held them with my one hand, and turned in my seat towards the harvester. The sack-sewer got out and started to give me the count, and just at that moment, I believe, the harvester went over a check sideways, and the wheel on the right side of the harvester was up on top of a check, while the wheel on my side was down over the check, making the harvester look as though it was going to tip over, and that is what scared my horse, and he started out from the harvester,
>
> * * * * * * *
>
> Q. Now, when your horse started to run and you had your lines held in your left hand, do you remember how tight or taut you had the lines at the time you were driving along, whether they were loose or taut, or what?
>
> A. I held them so that I had perfect control of the horse, at any moment.
>
> Mr. DUNNE. I move to strike that out as not responsive to the question.
>
> The COURT. That will be stricken out, and I wish you would talk a little louder.
>
> Mr. TREADWELL. Just tell the court about how you were holding them when the horse was walking alongside the harvester and you had them in one hand, that is, if you remember how you held them?

A. I don't remember.

Q. You don't remember how taut you were holding them?

A. I know that I had them tight enough to keep the horse under control.

The lines were regular buggy lines. I know that I had them under me, and they hung down the back about two feet. This is the same harness I used before, although the horse was different; ordinarily when I used the lines the lines were under me on the seat and hung down a couple of feet behind. When I was holding them in my hands I was sitting on the lines. When the horse started to run I grabbed the lines with both hands and tried to hold them, but on account of the checks I would bounce out of my seat and I would loosen them again, and he would get another start. I would bounce up from the seat. During all that time I had the lines in both hands. I never at any time lost control of the lines from the time the horse started to run and I took the lines from one hand to two. I kept them in two hands all the time that it was being bounced up over these checks.

The horse ran until I got him entirely under control, I should say a block, about 300 yards. * * * My horse was alongside the harvester. My horse ran and the mule team ran and later on when I returned to talking distance I was advised that Mr. Spina was unconscious. When I was alongside the harvester my horse was walking and the mule team was walking, too. The reins were in my left hand. I changed them to my left hand. At that time I was looking toward the machine and the sack-sewer was getting out of the harvester on the side I was on. He started to go toward me. I was looking toward the harvester. It was then that the horse ran. * * * I think what frightened my horse was the fact that the harvester was going over the ditch and it was tipped at an angle, and that was what frightened my horse." (Rec. pp. 101-106.)

It will be seen that this version of the matter is not materially different from the combined version of the other witnesses, and far from showing any negligence, it simply shows the ordinary conduct that any reasonable man would follow under like circumstances.

Under the law this conduct did not constitute negligence.

The horse having run away while the driver was in the cart, there is no presumption that this was due to negligence.

Rowe v. Such, 134 Cal. 573;

and the opinion of Judge Farrington in the case at bar filed July 13, 1914.

"It is well settled in cases such as this that the owner of an animal, not naturally vicious is not liable for an injury done by it, unless two propositions are established: 1. That the animal in fact was vicious; and, 2, that the owner knew it."

Clowdis v. Fresno Flume etc. Co., 118 Cal. 315;

Reed v. Southern Express Co., 95 Ga. 108; 51 A. S. R. 62;

Hollyburton v. Burke County Fair Assn., 119 N. C. 526; 38 L. R. A. 156;

Eddy v. Union R. Co., 25 R. I. 451; 105 A. S. R. 897.

Neither of these requisites appear in this case, but it affirmatively appears that the horse was gentle and none of the parties ever knew of its being otherwise.

There is no rule of law which compels a person driving a horse to keep it absolutely under control.

Caughlin v. Campbell-Fell Bakery Co., 39 Colo. 148; 121 A. S. R. 158; 8 L. R. A. (N. S.) 1501;

Fallon v. O'Brien, 12 R. I. 518; 34 A. R. 713;
Lynch v. Kineth, 36 Wash. 368; 104 A. S. R. 958.

A person is only required to exercise that degree of diligence and care which a man of ordinary prudence might be expected to exercise under the same circumstances..

Phillips v. Dewald, 79 Ga. 732; 11 A. S. R. 458;
Billes v. Kellner, 67 N. J. L. 255; 91 A. S. R. 429;
Kimble v. Stackpole, 60 Wash. 35; 35 L. R. A. (N. S.) 148.

It is not negligence to drive a horse which shows signs of being unruly.

Creamer v. McIlvain, 89 Md. 343; 73 A. S. R. 186.

Many courts have held that leaving a horse unhitched on a public street, but in the immediate presence of the driver, is not negligence.

Belles v. Kellner, 67 N. J. L. 255; 91 A. S. R. 429;
Hayman v. Hewitt, Peake's Add. Cas. 170;
Bennett v. Ford, 47 Ind. 264.

The last two cases are extreme in their facts and if courts have held that driving unruly horses and leaving horses unhitched on public streets, is not negligence, *a fortiori,* the mere running away of an ordinarily gentle horse, while the driver is in the cart holding the lines, is not negligence. The following cases, however, are directly applicable to the situation here:

Crocker v. Knickerbocker Ice Co., 92 N. Y. 652:

Action to recover for injuries sustained by plaintiff, who, while crossing a street, was run over by one of defendant's ice wagons, which was at the time being

driven by a boy, a son of one of the defendant's employes. The court said, in part:

> "The only proof of negligence was that the driver was driving the team on a 'lively trot'. It cannot be held as matter of law or fact that merely driving at the rate of speed stated, in the streets of a city, is negligent. Persons driving in the streets of a city are not limited to any particular rate of speed. They may drive slow or fast, but they must use proper care and prudence, so as not to cause injury to other persons lawfully upon the streets. There was no proof in this case or at least not sufficient proof for submission to the jury, that the team was driven carelessly, or that the driver was negligent."

O'Brien v. Miller, 60 Conn. 214; 25 Am. St. Rep. 320, 322:

A horse, attached to a cart, ran away while in charge of the driver, and notwithstanding his efforts to control it, ran over and injured a person in the street. Plaintiff sued the owner and was nonsuited. In sustaining the nonsuit the court said:

> "If, however, it is claimed only that the fact of the horse running away affords a presumption of fact that there was negligence on the part of the defendants, then, of course, it must be taken in connection with the other facts. There is the fact that the horse had previously been frightened when near the cars, and had become unmanageable. This fact is not of itself evidence of negligence, although it might call for increased care on the part of the driver. And then there is the fact proved that at the time of the collision the driver was exercising the highest care to prevent injury. This, so far from showing negligence, is positive evidence the other way. No other fact is found in the evidence. We think the nonsuit was properly granted, and that there is no error."

Nilan v. Gas Co., 1 N. Y. A. D., 234:

In an action brought to recover damages resulting from the death of plaintiff's intestate, it appeared that he was riding on a wagon and that as the leading horses came opposite a trench of defendant's they shied at earth thrown out by laborers in the trench; that the driver pulled them over again, when the end of the wagon slewed against the curb whereupon the deceased was thrown off. Held that the only possible ground of recovery must be based upon the fact that earth was thrown out of the trench while the team was passing, and that such act did not constitute negligence. The court said, in part:

> "It would be practically impossible to guard against the happening of every event which might chance to frighten a timid team. It seems unreasonable to require the exercise of exceptional care simply because it sometimes happens that a very trifling occurrence will occasionally induce a sensitive horse to shy. In my opinion the proof failed to make out any negligence on the part of the agents of the defendant leading to the injury to the plaintiff's intestate, and hence the complaint was properly dismissed."

Button v. Frink, 51 Conn. 342; 50 Am. Rep. 24:

In passing on an instruction the court held that the burden of proof which the plaintiff usually has, was not shifted where a horse ran away and colliding with plaintiff injured him, and it further held that no presumption of negligence could be drawn from the mere fact of the horse's running away. The court in its opinion said:

> "If a horse is running away with his driver, there is nothing in the fact itself which tends to

show negligence in the driver, or which tends to show how the horse became unmanageable, any more than a house on fire tends to show the origin of the fire, whether accidental or otherwise, and it would seem that it could as well be inferred in such a case that the party residing in the house was guilty of negligence in causing its destruction, in the absence of explanatory evidence showing the contrary, as it can be inferred from the mere fact that a horse is running away that the driver is guilty of negligence in causing his running, in the absence of proof to the contrary. If such a doctrine should be established as the law, it is not easy to see to what extent it might not be carried."

Keck v. Sandford, 2 Misc. (N. Y.) 484:

Action to recover for personal injuries alleged to have been sustained by plaintiff by reason of defendant's driver running into the wagon of plaintiff. Judgment for plaintiff and defendant's motion for a nonsuit denied. On appeal the judgment was reversed, the court saying:

"Even had the evidence been clear that defendant's wagon was being driven fast, that fact alone was not sufficient to support any finding of negligence on the part of the defendant, unless the wagon had been driven at an unlawful rate of speed, a rate of speed forbidden by law or ordinance, in which case there would be a presumption of negligence on the part of the driver."

Robinson v. Bletcher, 15 Upper Canada Q. B. 159.

Action for negligence brought by plaintiff because defendant's horses ran away on the road and ran into plaintiff's sleigh, injuring plaintiff. No evidence of negligence was introduced except one witness who testi-

fied that he thought if more care had been used in driving the accident would not have happened. Verdict for plaintiff and a new trial was granted on the ground that there was no negligence as a matter of law.

Brown v. Heather, 8 Upper Canada, L. J. (N. S.) 86:

The horse of the defendant being balky, the defendant struck it with a whip to start it, his servant boy being on it. The horse started off and knocked down and injured the plaintiff in a lane along which the horse ran. The boy tried to stop the horse and called to the plaintiff. The plaintiff was nonsuited. Held that the nonsuit was right.

The cases quoted from are very similar in their facts to the case at bar and show that, unless negligence is affirmatively proved, no negligence can be presumed from the mere fact that the horse ran away and caused damage, nor from the additional facts that the driver was young and that the horse was going "fast" or at a "lively trot". On the authority of the above cases and on the facts of this case there is no negligence as a matter of law or fact.

Collateral matters which may be relied on by defendant in error, but which in no way show negligence on the occasion in question:

There is certain evidence in the record on which the defendant in error may rely in support of its claim of negligence, but that evidence is entirely immaterial to the subject in hand, as it had nothing to do with the running away of the horse. (a) In the first place, certain evidence was introduced showing that four days

before the accident, Twining came to the harvester with a different horse and got out of the cart, leaving the horse unattended and it wandered around near the mule team and he was warned that this was not safe. Such evidence, of course, was not competent for the purpose of proving negligence, but at most only for the purpose of showing that knowledge was brought to Twining that it was unsafe to leave the horse unattended (*21 Am. & Eng. Ency. of Law,* pp. 518-519). As Twining did not leave the horse unattended on the day of the accident, this incident has no weight in showing any negligence which was the cause of the accident. The evidence is without dispute that it was in no way unsafe to approach the harvester with a horse and cart. The witness *Knight* testified on this subject as follows:

> "It is not unusual at all for a buggy or a cart to drive up along the harvester while it is in operation from behind; they keep out of sight of the mules. The noise that would be ordinarily made by driving a horse and cart in an ordinary way up to the side of or from the rear of the harvester, over the ground, would be pretty nearly, if not entirely, killed by the noise of the machine itself. It is not an extraordinary or unusual thing at all to drive a cart up alongside of the machine for the purpose of getting the count of sacks or for any other purpose. That is done, the foreman will come up or a boy getting sacks, as a general thing, wherever harvesting is being done." (Rec. p. 45.)

(b) In the same manner there was certain evidence that in coming across the field before approaching the harvester Twining zigzagged, coming be-

tween a run and a gallop, and circled his horse behind the harvester before driving up alongside of the harvester. As none of these things in any way frightened the mules, they should be entirely disregarded in determining the matter in hand. There was no law, reason or rule requiring the cart to make a straight line across the field or to walk across the field, because as the evidence here shows the noise of a horse going across the field before getting to the harvester would not be heard by the mules at all on account of the noise of the machine, and it is not claimed that this in any way frightened the mules, or in any way caused them to run. The field was a checked field, which would account for the zigzagging of the driver (Rec. pp. 100-101).

II.

PLAINTIFF MADE NO CASE FOR THE REASON THAT HE WAS NOT PROVED TO BE THE DULY APPOINTED, QUALIFIED AND ACTING ADMINISTRATOR OF THE ESTATE OF THE DECEDENT, FOR THE REASON THAT THE ORDER APPOINTING HIM REQUIRED HIM TO FILE A BOND, AS REQUIRED BY LAW (Rec. p. 78), AND THE BOND GIVEN BY HIM (Rec. p. 81) WAS NOT THE BOND REQUIRED BY LAW, AND WAS VOID ON ITS FACE.

In the order appointing the plaintiff administrator of the estate of Pietro Spina, deceased, the court required, as the law required, that a bond "as required by law" be filed by him before the issuance of letters (Rec. p. 78). Section 1388 of the Code of Civil Procedure reads as follows:

affect the validity of his appointment, nor of any act performed by him after giving the bond, especially where no official act was performed, or attempted to be performed, in the mean time."

Chief Justice Beatty, in his concurring opinion in *Dennis v. Bint,* 122 Cal. 39, 48, said:

"But a critical examination of these cases will show that in none of them was the proposition as here stated actually involved. In every instance there had not only been a failure to take out regular letters of administration, but also a failure to comply with one or more of the *essential* conditions expressly imposed by the order (or in the last case the law) authorizing the party to administer, that is to say, he had failed to take the oath or file the bond, or both."

Pryor v. Downey, 50 Cal. 388, 399:

"It was found by the District Court that Forster was never appointed administrator, but that a conditional order only was made to the effect that he should become administrator, on giving security by filing the bond required by law; and it is further found that he never filed such bond, or otherwise qualified as such administrator. The order for the appointment, the qualification of the appointee, and the issuing of letters to him, were all necessary proceedings to invest such appointee with the office of administrator. (Estate of Hamilton, 34 Cal. 464.) The letters of administration may indeed, when issued, be evidence of the regularity of the previous proceedings, but here no letters were ever issued, and it affirmatively appears that no bond was ever filed, nor oath taken. Forster, therefore, was not administrator of the estate, and both the pretended sale by him and the order purporting to authorize it made by the Probate Court—then a court of inferior and limited jurisdiction—were inoperative to transfer to the purchaser any right or estate in the land, legal or equitable."

O'Neal v. Tisdale, 12 Tex. 40:

This action involved the objection to the substitution of an administrator *de bonis non* in a suit for an administratrix. Objection sustained. The court said:

> "The order of the Probate Court, making the appointment, was coupled with a condition that had to be complied with, before he could be the legal administrator; and the condition was, that he should give bond and security as required by law. That he had done so was not proven."

M'Williams v. M'Williams, 4 Rawle 382:

> "The administration bond having been executed but by one surety, the grant of administration which was the foundation of the plaintiff's title to sue in the action again Clark is, ipso facto, void, by the positive and unequivocal declaration of the legislature."

Feltz v. Clark, 4 Humphreys 79 (Tenn.):

> "But although in the absence of a bond the court may have regarded the defendant as administrator de facto, surrounded by all the other circumstances indicated, still until bond actually given, we do not perceive how, under our statute, the court could regard the office of administrator as in strictness filled."

Bradley v. The Commonwealth, 31 Pa. St. 522:

> "It seems to us very clear that this is no administration bond: for the law requires two or more sureties, and there is only one; and the bond was drawn for two, and only one of them has signed it. In such a case, by the very terms of the law, the letters of administration are void, and the person acting under them became administratrix of her own wrong, which is inconsistent with the attribution of any validity of the bond. See 4 Rawle 382; 4 Watts 21."

III.

PLAINTIFF WAS NOT ENTITLED TO RECOVER, FOR THE REASON THAT THERE WAS NO EVIDENCE INTRODUCED SHOWING THAT THE PERSON WHO WAS KILLED WAS THE HUSBAND OF THE ALLEGED WIDOW, GIUDITTA DI GIOVANNI PETROCELLI SPINA, OR THE FATHER OF THE ALLEGED CHILD, ASSUNTA SPINA, IN THIS THAT THE ACTION WAS ORIGINALLY BROUGHT BY THE ADMINISTRATOR OF PETER SPINO AND LATER ADMINISTRATOR OF THE ESTATE OF PIETRO SPINA, SOMETIMES KNOWN AS PETER SPINO, WAS SUBSTITUTED, BUT NO EVIDENCE WAS INTRODUCED THAT THE MAN WHO DIED WAS THE SAME PERSON AS THE PIETRO SPINA WHO WAS MARRIED IN ITALY THIRTEEN YEARS BEFORE OR THAT THE WITNESS GIUDITTA PETROCELLI WAS THE SAME PERSON AS THE ALLEGED WIDOW GIUDITTA DI GIOVANNI PETROCELLI SPINA. THE ONLY TESTIMONY IN THE RECORD IS THAT ON PAGE 85, AND IT IN NO WAY CONNECTS THE TWO MEN.

This suit was originally brought by G. E. Nordgren, as administrator of the estate of Peter Spino (Rec. pp. 6-9), and all of the papers appointing him administrator were entitled in the estate of Peter Spino (Rec. pp. 56-61). The complaint alleged that his heirs were Jovetta Spino and Sunda Spino (Rec. p. 8). Thereafter, it appears that a proceeding was started in the Superior Court in the matter of the estate of Pietro Spina, sometimes known as Peter Spino (Rec. p. 62), and resulted in the revocation of letters in the proceeding in the matter of Peter Spino, and the appointment of an administrator in the matter of Pietro Spina, sometimes called Peter Spino. Thereupon an amended complaint was filed by the new administrator of the estate of Pietro Spina, sometimes known as Peter

Spino, and alleging that his heirs were Giuditta di Giovanni Petrocelli Spina and Assunta Spina, aged six years (Rec. p. 17). It is admitted by the pleadings that the man who died was named Pietro Spina, although he was sometimes known as Peter Spino. In order to recover, it was necessary to show that the decedent left heirs.

Webster v. Norwegian Mining Co., 137 Cal. 399.

But the only testimony on that subject is the testimony of a woman who says her name is Guiditta Petrocelli (Rec. p. 85). She says that she knew Peter Spino or Pietro Spina, but does not say which she knew, or which is the correct name, and that they were married thirteen year ago in Italy. He left Italy to come to the United States seven years ago and there is no evidence that he ever came to California or is the same party who is here known either as Pietro Spina or Peter Spino. The witness herself never came to the United States until after the date of the death of the party who was killed, and while she testified that she had one child named Assunta Spina she did not testify that it was the child of the decedent, nor that it was born in lawful wedlock. It might be an adopted child from all that appears. There is, therefore, absolutely no evidence in the record that the party who married Giuditta Petrocelli in Italy thirteen years ago was the same party who was killed, or the Peter Spino whose administrator brought this suit.

This matter is made still more uncertain by the fact that the original complaint was brought on behalf of

Jovetta Spino and *Sunda Spino,* heirs of Peter Spino (Rec. p. 8), whereas the amended complaint was on behalf of *Giuditta di Giovanni Petrocelli Spina* and *Assunta Spina,* heirs of Pietro Spino (Rec. p. 19). The alleged widow is *Giuditta di Giovanni Petrocelli Spina,* the witness is *Gui*ditta Petrocelli, the alleged child was *six* years old in July, 1913 (Rec. p. 19) and the child of the witness *ten* years old in August, 1914 (Rec. p. 85). The name of the witness is not the same as the alleged widow, the age of her child is not the same as his alleged child; the names of the heirs of Peter Spino are not the same as the names of the heirs of Pietro Spina. Here not only the heirs are changed but the decedent is changed also. Again, if the real name of the deceased was Pietro Spina, administration in the name of Peter Spino was a nullity, the suit was improperly instituted by the administrator appointed in that estate, and could not therefore be given life by amendment. In view of the ease of finding persons who even honestly but erroneously believe themselves to be heirs of decedents, it would be folly to compel us to disprove the identity of the parties when no proof of identity was offered, and the dissimilarity of names raises the presumption of different parties rather than identity. The presumption that identity of person is presumed from identity of name can not apply in this case to assist plaintiff, for that presumption can only prevail where the names are identical in fact. Here they are not identical as shown by the following authorities:

For the presumption of identity of persons to arise from identity of names the names must be identical.

Bowman v. Little, 61 Atl. 223, 226 (Md.):

> "It is true, generally speaking, identity of names is prima facie evidence of identity of persons; but the names, of course, must be identical, and this involves the identity of the Christian names; the identity of the initials thereof being insufficient. 15 Am. & Eng. Ency. L. 918, 919, and cases cited in notes. As already indicated, George W. Bowman, as named in the certificate, is by no means identical with G. Walter Bowman, the deceased, and no inference can be drawn that these two designations point out the same individual."

Bedwell v. Ashton, 87 Ill. App. 272, 274:

> "There was no proof that Claes Lundine, who was made a defendant, was ever a stockholder. The name of Chas. Lundine appears as a stockholder, but *the two names are not idem sonans, and, in the absence of proof, we can not assume that they are the same person.*"

Clary v. O'Shea, (Minn.) 75 N. W. 115:

> "The defendants named in the summons in that action are 'John O.Shea and also all other persons or parties unknown', etc. * * *
>
> In the judgment and order for judgment the name is written 'John O Shea', which is in the same form except that the period is omitted after the 'O'. In our opinion it can not be presumed that 'John O'Shea, named in the patent, is the same person as 'John O.Shea', named in the summons and proof of service thereof in that action. *'O'Shea' and 'Shea' are not the same name.*

Pietro Spina and Peter Spino as a matter of law are not idem sonans.

William Becker v. German Mut. Fire Ins. Co., 68 Ill. 412:

Action on a premium note alleged to have been executed by William Becker. Note was signed by Wilhelm Becker. Court held this was not *idem sonans,* saying:

> "There is here a difference in the orthography and sound of the names. We can not hold them to be the same, unless it be so made to appear by averment and proof. There is here no such averment or proof, the only proof in that respect being that the signature to the note is in the German language. *We can not judicially know that Wilhelm in the German language is the same as William in English.*"

Cleveland, C. C. & St. L. Ry. Co. v. Pierce, 72 N. E. 604 (Ind. App.):

Held that one suing as administratrix of the estate of "Ferdinand N." A. can not maintain an action for the death of "Fernando W." A. The court said:

> "The names 'Ferdinand' and 'Fernando' do not sound the same, nor are they substantially identical in sound. Both words are common Christian names, and their pronounciation and sound are radically different. * * * In the case we are considering, the names 'Ferdinand' and 'Fernando', as they appear in the title of the cause and body of the complaint, can not be 'sounded alike', even by 'doing violence to the power of the letters in the variant orthography'. In 'Ferdinand' we have the vowel 'i', and no letter to correspond with it in sound in 'Fernando', while in the latter name we have the vowel 'o' and no corresponding letter in sound in the former. The only syllable in the two

names that has the same sound is the first 'Fer', while the other two are essentially and radically different."

Burford v. McCue, 53 Pa. St. 427:

"But it was argued, that the jury might infer that R. P. O'Neil stood for Rev. P. O'Neil. That the letter R. in the signature stood for 'Rev.' and was not an initial in the name. *But this could not be presumed, unless some habit of so using it had been shown* on part of 'Priest O'Neil' as he was called. The initials preceding a surname in a signature are always understood to be the initials of a name, and not the abbreviation of a title, unless proved to be the former and not the latter. *There was no proof at all of this.* As the case stood, therefore, *without proof of identity to submit to the jury as a question of fact,* we think the court erred in submitting the instrument to the jury at all."

See also *Moynahan v. People,* 3 Colo. 367, where Patrick Fitz Patrick and Patrick Fitzpatrick were held not to be *"idem sonans',* and *Moore v. Allen,* 26 Colo. 197, where Waltimore Arens and Waldimar Arens were held not to be *"idem sonans".*

The presumption of identity of persons from identity of names does not apply in the case of remote transactions.

Sitler v. Gehr, 105 Pa. St. 577:

"Mere identity of name must be accompanied with some circumstances of time or place before we can attach any value to it as affecting rights of property.

It is true there are some authorities which hold that identity of name is prima facie evidence of identity of person. So much was said by Justice Sharswood in McConeghy v. Kirk, 68 Pa. St. 203. That this is the ordinary rule may be conceded.

But it does not apply where the transaction is remote. The true rule is believed to be that laid down by Chief Justice Gibson in Sailor v. Hertzogg, 2 Pa. St. 182, where he said: 'Identity of name is ordinarily, but not always, prima facie evidence of personal identity. The authorities on the subject may be consulted in Sewell v. Evans, 4 Ad. & El. (N. S.) 626, from which Lord Denham and other judges of the Queen's Bench concluded that identity of name is something from which an inference may be drawn, unless the name were a very common one or the transaction remote; and the reason given for casting the onus on the party who denies, is that disproof can be readily had by calling the person whose identity is denied into court. The name in this instance is not a very common one; but after more than a quarter of a century there ought certainly to be some preliminary evidence, however small'. The soundness of this rule can not be successfully questioned. It would work great injustice if rights of property, after a great length of time, were allowed to depend upon mere identity of name. A prima facie case thus submitted to a jury might be extremely difficult, if not impossible, to disprove. I know of no case in which mere identity of name has been held sufficient after the great lapse of time which exists here."

See:

Sailor v. Hertzogg, 2 Pa. St. 182, quoted above.

Roden v. Ryde, 4 Q. B. 629:

Suit on notes. Question of identity was raised. Lord Denman, C. J., in applying presumption of identity said:

"But, where a person, in the course of the ordinary transactions of life, has signed his name to such an instrument as this, I do not think there is an instance in which evidence of identity has been required, except Jones v. Jones, 9 M. & W. 75.

There the name was proved to be very common in the country; and I do not say that evidence of this kind may not be rendered necessary by particular circumstances, as, for instance, length of time since the name was signed."

IV.

THE RECORD FAILS TO SHOW THAT THE DISTRICT COURT HAD ANY JURISDICTION OF THE CASE MADE BY THE AMENDED COMPLAINT, AND FOR THAT REASON THE JUDGMENT SHOULD BE REVERSED.

The original complaint showed no diversity of citizenship, but the petition for removal alleged that defendant was a citizen of Nevada and the plaintiff Nordgren was a citizen of California and Jovetta Spino and Sunda Spino were subjects of the Kingdom of Italy. On these allegations the case was removed. The amended complaint was filed by Saverio di Giovanni Petrocelli, and contains no allegation of his citizenship. Under section 1370 of the Code of Civil Procedure an administrator is required to be a bona fide *resident* of the state, but not a *citizen* thereof, and no grounds of qualification can be added by implication (*Estate of Bauquier,* 88 Cal. 302, 312, *Estate of Muersing,* 103 Cal. 585). When the citizenship of an administrator is necessary to show jurisdiction it must be alleged *(Coal Co. v. Blatchford,* 11 Wall. 172, 20 L. ed. 179). The amended complaint does allege that the heirs, Giuditta di Giovanni Petrocelli Spina and Assunta Spina, are *residents* of the Kingdom of Italy, but not that they are *citizens or subjects* thereof. An allegation of residence is insufficient *(Horne v. Hammond Co.,* 155 U. S. 393; 39 L. ed. 197; 15 Sup. Ct. Rep.

167; *Wolfe v. Insurance Co.,* 148 U. S. 389; 37 L. ed. 493; 13 Sup. Ct. Rep. 602; *Menard v. Goggan,* 121 U. S. 253; 30 L. ed. 914; 7 Sup. Ct. Rep. 873; *Everhart v. Huntsville College,* 120 U. S. 223; 30 L. ed. 623; 7 Sup. Ct. Rep. 555; *Grace v. Insurance Co.,* 109 U S. 278; 27 L. ed. 932; 5 Sup. Ct. Rep. 207; *Brown v. Keene,* 8 Pet. 112; 8 L. ed. 885; *Marks v. Marks,* 75 Fed. 321). The heirs are the real parties in interest, and the administrator a mere nominal party, and their citizenship is controlling in determining jurisdiction *(Stewart v. Baltimore & Ohio R. R. Co.,* 168 U. S. 449; 42 L. ed. 537; 18 Sup. Ct. Rep. 105; *Munro v. Dredging Co.,* 84 Cal. 515, 518; *Webster v. Norwegian Mining Co.,* 137 Cal. 399).

We recognize that where the court acquires jurisdiction, as it did in this case by the removal, it would not lose jurisdiction by the mere change of an administrator of a party whose citizenship was sufficient to confer jurisdiction although the new administrator was not a citizen of the same state. But here by the original removal the court acquired jurisdiction of a controversy in favor of Jovetta Spino and Sunda Spino as heirs of Peter Spino. The amended complaint seeks to confer jurisdiction in respect to a controversy in favor of Giuditta di Giovanni Petrocelli Spina and Assunta Spina as heirs of Pietro Spina. There is nothing certainly in the record showing that the people are the same and, therefore, there is an entire lack of showing of requisite diversity of citizenship to sustain the jurisdiction of that controversy. In case of a controversy with a new party to the suit brought in by amendment, the requisite diversity of citizenship of the new party must be alleged *(Course*

v. Stead, 4 Dall. 27; 1 L. ed. 724). This objection may be raised at any time without any plea *(Susquehanna etc. Co. v. Blatchford,* 11 Wall. 172; 20 L. ed. 179). The presumption is that the case is without the jurisdiction of the court and this presumption continues in this court *(Bors v. Preston,* 111 U. S. 255; 28 L. ed. 419; 4 Sup. Ct. Rep. 407; *King Bridge Co v. Otoe Co.,* 120 U. S. 226; 30 L. ed. 623; 7 Sup. Ct. Rep. 552; *Stuart v. Easton,* 156 U. S. 47; 39 L. ed. 341; 15 Sup. Ct. Rep. 268; *Mansfield etc. Ry. v. Swan,* 111 U. S. 383; 28 L. ed. 462; 4 Sup. Ct. Rep. 512; *Roberts v. Lewis,* 144 U. S. 658; 36 L. ed. 579; 12 Sup. Ct. 781; *Capron v. Van Noorden,* 2 Cranch. 126; 2 L. ed. 229; *Von Voight v. Michigan etc. Co.,* 130 Fed. 398). Citizenship must be alleged and it is not sufficient that it may be inferred argumentatively from the pleadings *(Brown v. Keene,* 8 Pet. 112; 8 L. ed. 885; *Robertson v. Cease,* 97 U. S. 646; 24 L. ed. 1057; *Continental Ins. Co. v. Rhoads,* 119 U. S. 240; 30 L. ed. 380; 7 Sup. Ct. Rep. 193).

We therefore submit that a new controversy in favor of people not named in the original complaint and respecting the estate of a person not named in the original complaint having been inaugurated by the filing of the amended complaint, it was necessary that the requisite diversity of citizenship be shown. The mere fact that this was done by consent can not alter the case, for consent can not confer jurisdiction where none is shown to in fact exist.

V.

THE COURT ERRED IN PERMITTING EVIDENCE TO BE INTRODUCED AS TO AN ALLEGED ACT OF NEGLIGENCE OF TWINING ON AN ENTIRELY DIFFERENT OCCASION.

As appears by assignment of errors one to five, the court permitted witnesses to testify to an occasion four days before the accident when Twining came to the harvester, and got out and left his horse unattended. It was not the same horse which he had on the day of the accident (Rec. p. 44), and the court also permitted the witnesses to testify as to what was said to him on that occasion. It is well settled that proof of other and distinct acts of negligence is not admissible for the purpose of proving negligence *(21 Am. & Eng. Ency. of Law*, pp. 518-519). This testimony is attempted to be justified for the purpose of showing that Twining knew that a horse unattended might scare the mule team, but we submit that until it was first shown that Twining on this occasion left the horse unattended it was not competent or material to show that he knew it was dangerous to do so. The evidence here shows that it was not dangerous to approach the mule team with a horse and cart in the regular manner (Rec. p. 45), and to prove that Twining knew that something was dangerous which he did not do on this occasion was entirely improper, and of course the prejudicial nature of such testimony can easily be appreciated by the court.

VI.

THE COURT ERRED IN SUBMITTING TO THE JURY THE LAW AS TO THE LIABILITY OF A KEEPER OF A VICIOUS ANIMAL WHEN THERE WAS NO EVIDENCE THAT THE ANIMAL WAS VICIOUS.

The court by instruction covered by assignment of error No. 10 submitted to the jury the law as to the liability of a person for injury inflicted by a vicious animal. In view of the fact that there was no evidence whatever of the vicious character of this animal or the knowledge of any one that it was vicious, this instruction was erroneous and extremely prejudicial.

Slaughter v. Fowler, 44 Cal. 195;
Sargent v. Linden Mining Co., 55 Cal. 204;
Kendricks Estate, 130 Cal. 360;
Fowler v. Smith, 2 Cal. 39;
Crawford v. Roberts, 50 Cal. 235;
Nofsinger v. Goldman, 122 Cal. 609;
Meyer v. Foster, 147 Cal. 166;
Budan's Estate, 156 Cal. 230.

VII.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS TO THE EFFECT OF CONTRIBUTORY NEGLIGENCE AS LAID DOWN BY THE ROSEBERRY ACT, AND IN GIVING THE COMMON-LAW INSTRUCTIONS ON THAT SUBJECT.

While we feel that there was strong evidence in the record of contributory negligence, we would not expect this court to hold as a matter of law that contributory negligence was proved, but for the purpose of showing

the importance of the error of the court in its instructions on this subject, we refer to the following evidence:

Albano testified that when Spina fell he had the lines tangled up about his foot (Rec. p. 37).

Knight testified that he did not know "whether he fell off or jumped off or how he got off" (Rec. p. 48).

Salapi testified that Spina left both of the lines on the seat when he fell (Rec. p. 52) and that they got tangled around his foot (Rec. p. 52).

Wallis testified that in case the team ran it is the duty of the driver to put on the brake and keep the team straight or circle them, if it is better to do so (Rec. p. 88). If a man falls from the seat he would take the lines with him (Rec. p. 89).

Safford testified that some drivers supply themselves with a strap and tie themselves in and these straps do not usually come with the harvester (Rec. p. 95). Spino did not do so in this case.

It therefore results that the inference might fairly be drawn that decedent took no precautions to secure himself in the seat and that when the team began to run he probably dropped the lines and jumped from the seat, instead of doing what was required of him. In fact there is respectable authority to the effect that in a case of this kind plaintiff must affirmatively show that the decedent was free from fault. *(Gay v. Winter,* 34 Cal. 153, 164.)

We asked the court to instruct the jury as to the law of contributory negligence as laid down in the Roseberry Act (Stats. 1911, p. 796), which, in effect, provides that

where the contributory negligence is slight and that of the employer is gross, contributory negligence shall not be a defense but shall be a ground for diminishing the damages in proportion to the amount of negligence attributable to the employee. In other cases, that is where the contributory negligence is not slight or the negligence of the employer is not gross, the common-law rule of liability apparently still prevailed under the Roseberry Act. But the court refused all of the instructions in this matter and instructed the jury absolutely that "contributory negligence was a complete defense, however slight, contributing proximately thereto". The instruction given was clearly erroneous and the instructions refused seem to have been in strict accord with the Roseberry Act, and the only question is as to whether or not the error was prejudicial. It might be argued that an instruction which relieved the defendant from liability when he should not have been relieved would not be injurious to him, but the court well knows the unpopularity of the plea of contributory negligence, and it was on account of the unpopularity and apparent injustice of throwing all of the burden on the employee when the injury was caused only partly through his fault, that the defense was modified by the Roseberry Act and has since been largely repealed by the Workmen's Compensation Law. Instead then of being permitted to go to the jury with a proposition that they should measure the degree of fault and fix the damages accordingly, we were sent to the jury with the instruction that if any contributory negligence existed they must find a verdict in favor

of the defendant. We, therefore, are unable to see how it can be said that giving the jury an instruction not only contrary to law, but contrary to public opinion and refusing an instruction in accordance with law, and in accordance with public opinion, can be said to be without prejudice.

In this same connection, we asked that the jury be instructed that the plea of contributory negligence can not be taken as an admission by the defendant that it was in any way guilty of negligence (see specification 22, Rec. p. 152).

The court refused this instruction under a misapprehension as to the meaning of the decisions in *Linforth v. San Francisco Gas & Electric Co.,* 156 Cal. 58, 66, and *Mulholland v. Western Gas Co.,* 21 Cal. App. 44, 52.

In the *Linforth* case, supra, it was held that it was proper to instruct a jury that the claim of contributory negligence "*presupposes* the existence of negligence on the part of defendant", but this is quite different from the contention that our instruction sought to negative, namely: that a plea of contributory negligence was an *admission* of negligence or *evidence* of negligence by the defendant, for in the *Linforth* case itself the court said:

> "Against this instruction it is urged that it would 'naturally lead a not over intelligent jury to infer that the defense of contributory negligence was tantamount to a confession of negligence by the party asserting the defense.' * * * If, as appellant seems to contend, the jury through ignorance did not understand them, the fault lies not with the law."

This matter is still more clearly pointed out in the *Mulholland* case, supra, in which the same instruction was given as in the *Linforth* case, and in the dissenting opinion by Beatty, C. J., referring to the instruction given in the *Linforth* case it is said:

> "It plainly tells the jury that a plea of contributory negligence of the plaintiff is an admission of culpable negligence on the part of the defendant. This is not the law. A defendant may deny that he was guilty of any negligence, and at the same time may consistently claim that even if the jury should find that he has been negligent, the plaintiff would not have sustained any injury if it had not been for his own negligence as a proximate cause."

We are therefore confronted with an instruction which the Supreme Court says might be misunderstood by the jury through ignorance and which the late Chief Justice understood as conveying the same impression which the court admitted the jury through ignorance might draw from it, and under those circumstances we were entitled to a clear, plain, distinct instruction to the effect that the plea of contributory negligence was not an *admission* of negligence or *evidence* of negligence on the part of the defendant.

VIII.

THE COURT ERRED IN REFUSING THE REQUESTED INSTRUCTION AS TO THE MEASURE OF DAMAGES.

The plaintiff requested the court to instruct the jury that damages in a case of this kind can not be made vindictive to punish the defendant, that they can not

be based on the sorrow, grief or suffering which the death may have caused, and that they must be limited to pecuniary loss to the heirs (Rec. p. 128). The only instruction given by the court on this subject is found in the record, pages 118-119. The court there instructed the jury that they might consider the pecuniary loss and that they must not consider the sorrow of the widow and child. The court did not instruct that the damages could not be made vindictive or that they were limited to the pecuniary loss, and that they could not consider grief or suffering. The instruction requested was correct and should have been given.

Munro v. Pacific Coast D. & E. Co., 84 Cal. 515.

IX.

THE COURT ERRED IN REFUSING THE REQUESTED INSTRUCTION AS TO THE NECESSITY OF PLAINTIFF SHOWING WHETHER HE WAS UNDER THE ROSEBERRY COMPENSATION LAW, AND FOR THE SAME REASON PLAINTIFF FAILED TO PROVE A CASE.

The defendant by instruction covered by assignment 12 (Rec. p. 124) asked the court to instruct the jury that it was necessary for the plaintiff to show whether or not the decedent was under the provisions of the so-called Roseberry Compensation Law. The court refused this instruction.

It will be noted that the Roseberry Compensation Act (Stats. 1911, p. 796) lays down the rule of liability for death of an employee in a case of this kind, provided the parties have elected to come under the act. The

right to recover damages for death being entirely statutory and there being two statutes on the subject, one fixing the liability where the employer has elected to come under the act, and one fixing the liability where no such election has taken place, it would seem clear that any one seeking to recover under either act must show whether or not such an election has been made. Obviously, if he sought to recover under the part of the act which provided the compensation in case election had been made, he would have to allege the election, and there seems to be, therefore, no reason why, if he claims under part of the act which fixes the compensation in case no election has been made, he should not likewise allege that no such election has been made. One provision of the law is just as general as the other, and neither is in form or substance an exception to the other. One lays down a law of liability where the election has been made; one lays down the law of liability where the election has not been made, and an election or non-election being, therefore, a requisite on which to determine the basis of recovery, it would seem clear that it should be alleged and proved.

We respectfully submit that the judgment should be reversed.

EDWARD F. TREADWELL,
Attorney for Plaintiff in Error.

(APPENDIX FOLLOWS.)

APPENDIX.

In the District Court of the United States, in and for the Southern District of California, Northern Division.

Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina (sometimes known as Peter Spino), deceased,
Plaintiff,

vs.

Miller & Lux Incorporated (a corporation),
Defendant.

OPINION ON ORDER GRANTING NEW TRIAL.

FARRINGTON, District Judge:

At the close of plaintiff's case, defendant's motion for nonsuit, and its motion for an instruction directing the jury to render a verdict in its favor, were denied. It then rested, and now urges that the evidence fails to show any negligence on its part, and asks a new trial.

Pietro Spina was an employee of defendant. At the time of the accident, which caused his death, he was driving a thirty-two mule team attached to a harvester, and actually engaged in harvesting grain on defendant's ranch in Merced County, California. Twining, a young man of eighteen years, also in defendant's employ, drove up in a little cart drawn by a single horse. His business was to ascertain and record the number of sacks of grain

put out from the machine. The mules, taking fright, started to run just as the harvester crossed over a levee, and turned to the right into the field of grain. This levee was used for irrigation purposes, and was about two feet in height. When the machine passed over the levee, Spina, who was perched on a high seat above the team, fell off, and was dragged a short distance by one of the lines which had become tangled about one of his feet. Probably the strain on this line was what caused the mules to turn into the grain. After running some two hundred yards the mules came to a ditch; there they turned to the left. The foreman, Mr. Knight, who up to this time had been trying, without effect, to check them with the brake, jumped off the machine, ran ahead of the mules, and stopped them. Altogether the team traversed about three hundred yards. Knight then went back and reached Spina just before his heart ceased beating.

Immediately prior to the accident the mules were moving toward the west; Twining was zigzagging through the field from the south; as he approached "he circled his horse around" and came up alongside the machine, going in the same direction as the mules. Knight, as was his custom when any one drove up, went back on the rear of the harvester, and took hold of the brake. At the brake his view was obstructed, so he could not tell whether the horse was brought to a stop or not. He did not see Twining again until after the mules had started to run; at that time the horse was running alongside the mules, and eight to ten feet away

from them. The horse ran about two hundred yards before he was again under control.

Salapi, the header tender, says the cart never stopped; that Trainor got off the harvester and went toward Twining to give him the number of sacks, but did not reach him because the horse had started to run away. Salapi also testified: "I see the cart coming pretty fast, " and we was there close to a big high levee; well, when " this cart was going by, the mules started to run." When Salapi first saw the horse and cart, it was abreast of, and five or six steps from the harvester, back of the team, going pretty fast, and Twining was "holding the horse all he could, but it ran away".

Three days before the accident, Twining was warned by Knight to exercise more care in managing his horse as he approached the harvester.

Six men were employed on the harvester; Knight, the foreman; Spina, the driver; Salapi, the header tender; Albano, the sack tender; Trainor and Twining. Trainor and Spina are dead. Twining, who should know precisely how and why the accident occurred, how the mules became alarmed, and why his horse was running so rapidly as it passed the machine and came abreast of the mules, has not been produced as a witness; his absence is not accounted for.

The allegations of negligence in the complaint are as follows:

"IV. * * * Said horse, so furnished as aforesaid by said defendant to said Twining, was then and there, to the knowledge of said defendant, a restive, fractious,

vicious, frisky animal, not easily controlled, liable to run away, and a dangerous animal with which to approach said harvester team because of its frightening said mules. That on said first day of July, 1912, said defendant carelessly and negligently caused and permitted said Twining, for the purpose of counting and recording said sacks, to approach, and said Twining did approach, said harvester team with said dangerous and frightening horse aforesaid then and there entrusted to him by said defendant as aforesaid, without any effort to manage, restrain, control or quiet said horse, and failed and neglected to take any precautions in the care and driving of said horse to avoid the frightening of said harvester team; that by reason of said carelessness and negligence of said defendant, said dangerous and frightening horse aforesaid, did then and there frighten said harvester team, which, as above alleged, said decedent was then and there driving, and caused said harvester team to run away, whereby said decedent was violently thrown and precipitated from the seat on which he was riding to the ground, and run over and killed by said harvester, which was then and there being propelled by said frightened team of mules."

"V. That the aforesaid death of said decedent was caused and brought about wholly by reason of the aforesaid carelessness and negligence of defendant; and in particular by the carelessness and negligence of defendant in failing and neglecting to take reasonable and proper precautions to protect said decedent; and in particular, by the carelessness and negligence of defendant in failing and neglecting to supply and provide proper,

adequate and safe appliances and instrumentalities for the conduct of its operations; and in particular, by the carelessness and negligence of defendant in failing and neglecting to provide said decedent with a safe place of work; and in particular, by the carelessness and negligence of defendant in causing and permitting said Twining to use said dangerous and frightening horse; and in particular, by the carelessness and negligence of defendant in failing and neglecting to provide said Twining with such a safe and gentle horse as would enable him to approach said harvester team without frightening it."

Save the fact that the horse ran away on this occasion there is no evidence that he was restive, fractious, vicious, frisky, not easily controlled, liable to run away, or a dangerous animal with which to approach said harvester team.

The circumstance that a horse runs away, standing by itself, is no evidence of bad character. The horse may have had the best of reasons for so doing. Furthermore, it is not shown that defendant knew, or by proper investigation could have known, of any vice in the horse. Whatever evidence we have, indicates that Twining endeavored to manage, restrain and control the horse. Salapi says he "was holding the horse all he could". In the absence of proof that he "failed and neglected to take any precautions in the " care and driving of said horse to avoid the frighten- " ing of said harvester team", we are not at liberty to presume any such carelessness. There is no evidence that defendant failed and neglected to supply proper,

adequate and safe appliances and instrumentalities for the conduct of its operations. No effort was made to point out any defect in the harvester, the cart, the brakes, the harness, or any appliance or to show that defendant knew of any such defect, or had failed to make reasonable examination and inspection by which such defect, if it existed, might have been discovered.

If the place provided for Spina to work was unusually or unreasonably dangerous, or if defendant had failed to take precautions which an ordinarily prudent man engaged in harvesting would have taken under the same conditions which prevailed when this accident happened, there is nothing in the record, except the accident itself, to show it.

There is no danger in driving up to a harvester team from behind, provided the horse is driven in the ordinary manner; the danger is in "driving up in a heedless way, or at a high rate of speed, an unusual rate of speed, from behind," or "in driving alongside or past them". "It is the unusual thing that frightens a team, not the usual thing that is taking place all the time." "Some sudden noise like a runaway, frightens them."

It is clear from the testimony that the horse and cart were moving rapidly as they passed abreast of the machine; the horse, in spite of Twining's efforts, went on beside the mules, and caused them to take fright and run away.

This leaves no basis for any presumption that Twining negligently caused or negligently permitted his horse to run by the mules. The negligence, if there

were any, occurred before or at the time he lost control of the horse, and as to what happened then, there is no testimony. Losing control of the horse may have been unavoidable. The mere fact Spina was killed while in defendant's employ is not sufficient to charge the latter with responsibility. Defendant must have been guilty of some negligent act or omission which directly and proximately caused the accident, otherwise it is not liable. The burden is on plaintiff to show the existence of such negligence. This burden is not shifted because the witness who knows all about the occurrence was in defendant's employ, and was not placed on the stand. If plaintiff had made out a prima facie case, the fact that defendant could have produced Twining, but failed to do so, would justify the inference that Twining's testimony would be unfavorable. Such an inference, however, is not sufficient to establish a prima facie case in the absence of evidence of negligence. Here the only evidence of negligence is the accident.

As a rule the doctrine of *res ipsa loquitur* is not applicable as between master and servant, unless the circumstances are such that the accident could not have occurred if the master had used reasonable care. When the attempt is made to apply the doctrine to the present case, how can it be said with any degree of certainty that if Twining had exercised reasonable care the horse could not have run away, or would not have become frightened, or could not have been stopped when he reached the machine, and prevented from passing the mules? Any one familiar with horses can name a dozen

agencies for which defendant was in no wise responsible, which might have suddenly alarmed the horse and caused him to run away.

In Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, the Court said:

"Where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

In Briedenbach v. M. McCormack Co., 128 Pac. 423, it was held that the owner of a runaway horse was liable for injuries inflicted on a stranger, where it appeared that the horse had been left in the street unfastened, without a driver, because it is negligent to so leave a horse.

To the same effect see:

Gorsuch v. Swan, 97 Am. St. Rep. 836;
Gammon v. Wilson, 5 Atl. 381;
Unger v. 42d Street Ferry, 51 N. Y. 497;
Pearl v. McCauley, 39 N. Y. Supp. 472.

In Roe v. Such, 134 Cal. 573, the cause of the runaway did not appear. The first seen of the driver he was in the air, falling from his seat to the ground. How he lost control of the horse was not shown. The court said it was as fair to presume that the cause of the runaway was unavoidable as that it was the fault

of the driver, consequently the trial judge properly took the case from the jury, and nonsuited the plaintiff.

In Coller v. Knox, 23 L. R. A. (N. S.) 171, plaintiff was the only witness; he testified that just before the accident he saw defendant's team standing in a lane near defendant's house and a man at the head of the horses; when the plaintiff had driven some two hundred feet further on, he heard a warning to look out, and immediately after was struck by the runaway team. The court said: "The mere fact of a runaway does not by itself imply negligence," and affirmed the judgment of nonsuit.

See:

Gray v. Tompkins, 15 N. Y. Supp. 953;
O'Brien v. Miller, 25 Am. St. Rep. 320.

In the last case the court quotes with approval the following from Button v. Frick, 50 Am. St. Rep. 24.

"If a horse is running away with his driver, there is nothing in the fact itself which tends to show negligence in the driver, or which tends to show how the horse became unmanageable, any more than a house on fire tends to show the origin of the fire, whether accidental or otherwise; and it would seem that it could as well be inferred in such a case that the party residing in the house was guilty of negligence in causing its destruction, in the absence of explanatory evidence showing the contrary, as it can be inferred from the mere fact that a horse is running away that the driver is guilty of negligence in causing his running, in the absence of proof to the contrary. If such a doctrine should be established

as the law, it is not easy to see to what extent it might not be carried."

A new trial will be awarded, and each party will have thirty days within which to take such steps as he may be advised.

(Endorsed): No. 42 Civil. In the District Court of the United States, in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, deceased, v. Miller & Lux, Incorporated (a corporation), Defendant. Opinion. Filed July 13, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk.

No. 2711.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MILLER & LUX INCORPORATED, a Corporation,

Plaintiff in Error,

vs.

SAVERIO DI GIOVANNI PETROCELLI, as Administrator of the Estate of Pietro Spina, sometimes known as Peter Spino, deceased,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Attorneys for Defendant in Error.

Filed this.....day of February, 1916.

F. D. MONCKTON, Clerk,

By....., Deputy Clerk.

INDEX.

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STATEMENT OF THE CASE.

This is an ordinary common-law action to recover damages for death by wrongful act: the facts were fully developed: the charge was full and impartial: the rights of both sides were protected: two juries have determined the issues in favor of the plaintiff below; and no substantial reason appears to justify a finding of any reversible error.

The object of this action is to recover compensation for the death of Pietro Spina, sometimes known as Peter Spino, and the cause of action was grounded upon the negligence of the defendant. The action

was originally brought in the State Court by one G. E. Nordgren, who was the Public Administrator of the County of Merced in the State of California, and who was, at the time of the commencement of the action, the administrator of the estate of the deceased (Record, pp. 6-9). Subsequently, the cause was removed to the United States District Court for the Southern District of California, Southern Division.

In the meantime, by appropriate proceedings in the Superior Court of Merced County, sitting in probate, the letters of administration formerly issued to Nordgren were revoked, and the present plaintiff substituted as administrator in his stead (Plaintiff's Exhibit "A," probate record (Record, pp. 56-84). Thereupon, by an order of Hon. Olin Wellborn, then Judge of the court below, the present plaintiff was substituted for the former plaintiff Nordgren, and the present counsel substituted for those who represented Mr. Nordgren (Record, pp. 14-5).

It is correct, as stated by the plaintiff in error at p. 2 of its brief in this cause that "a demurrer to the original complaint was sustained": but that demurrer was sustained by stipulation, after the cause had been removed to the Federal Court, and by this stipulation time was given to the plaintiff below, now defendant in error, within which to file an amended complaint; and upon this stipulation, an appropriate order was made by the then Judge of the court below (Record, 15-17). It is further stated in the brief of plaintiff

in error, at p. 2, that "Later the court substituted as "plaintiff Saverio di Giovanni Petrocelli, as adminis- "trator of the Estate of Pietro Spina, sometimes "known as Peter Spino": but this statement is a mistake, the facts being that the "Certified Transcript of Record on Removal from Superior Court of Merced County" was filed in the lower Court on September 14, 1912, the order of substitution above referred to was filed on March 3rd, 1913, and the stipulation above referred to was entered into on April 30th, 1913, and the order made upon that stipulation was filed on May 5, 1913 (Record, pp. 13, 15, 16, 17). The Amended Complaint, prepared pursuant to said stipulation, was filed on July 17, 1913 (Record, p. 25, where the year is erroneously printed as "1912": (see jurat, top p. 24), and the Answer was filed on July 28, 1913 (Record, p. 30). In other words, not only is it the fact that "The defendant caused the "case to be removed into the United States District "Court" (Brief for plaintiff in error, p. 1), but all of the subsequent proceedings, including the two trials, took place after such removal, and took place without any suggestion whatever from defendant that there was anything irregular or improper in its own handiwork. It is to be noted that, on page 25, line 4 of the Record, a typographical error appears in the statement "filed Jul. 17, 1912": this should read, "Filed, Jul. 17, 1913." And so, on page 30, line 8,

of the Record, the words and figures "of July 1915" should read "of July 1913."

The Amended Complaint, after alleging the corporate character of the defendant, showed that on July 1, 1912, the deceased died at Midway Camp or Ranch, premises owned, occupied, controlled and operated by the defendant; and that ever since February 17, 1913, the plaintiff has been administrator of the estate of the deceased. It next appears that the deceased was about 35 years of age, married, and left as his sole heirs-at-law his wife and his minor daughter: that he had no other source of income except the wages he earned as a farm laborer: that at all times prior to his death, his wife and daughter were dependent upon him and his earnings for their support, and that he was dependent upon his wages for the support of his wife, his child and himself: and that his average earnings were $100 a month, out of which he contributed about $50.00 per month to the support of his wife and child—a support of which his death deprived them. The circumstances of the death are then described. It appeared that on July 1, 1912, the defendant was harvesting a crop at Midway Camp aforesaid, and the deceased was there engaged in the employ of the defendant in driving a thirty-two-mule-team harvester, used in harvesting this crop. At the same time, one Twining was employed by the defendant to attend the harvester and record the sacks as they came from it; and at the time of the death,

July 1, 1912, Twining was actually engaged in this employment. To enable Twining to perform his duties, the defendant furnished him a horse, which, to defendant's knowledge, was a restive, fractious, vicious, frisky animal, not easily controlled, liable to run away, and a dangerous animal with which to approach the harvester team because of its frightening the mules; and at the time of the death, the defendant carelessly and negligently caused and permitted Twining, for the purpose of counting and recording the sacks coming from the harvester, to approach, and Twining did approach, the harvester team with this dangerous and frightening horse, without any effort to manage, restrain, control or quiet the horse, and without taking any precautions in the care and driving of the horse to avoid frightening the harvester team. By reason of this, the horse did frighten the harvester team, which ran away, whereby the deceased was violently thrown to the ground from his seat and run over and killed by the harvester. The amended complaint then assembles the particulars in which the defendant was negligent as follows:

1. Neglect to take reasonable precautions to protect deceased.
2. Neglect to supply and provide proper, adequate and safe appliances and instrumentalities for the conduct of its operations.
3. Neglect to provide the deceased with a safe place of work.

4. Causing and permitting Twining to use said dangerous and frightening horse.
5. Neglecting to provide Twining with such a safe and gentle horse as would enable him to approach the harvester team without frightening it.

The allegations of damage then follow, together with the prayer for judgment.

The brief of defendant in error states that "the "amended complaint does not allege the citizenship "of either the plaintiff or the heirs on whose behalf "the suit was brought,"—just as if the action had originally been commenced in a Federal Court, or just as if the plaintiff below, instead of the defendant below, had, upon his voluntary initiative, caused the removal to the Federal Court: but the plaintiff below was not responsible for the removal: in that proceeding, the defendant below was the actor; and after having brought about this removal, the defendant below signed a stipulation providing for an amended complaint, accepted service of a copy of that amended complaint (24), and without demurring filed an answer to the merits which failed to tender any plea in abatement, or to the jurisdiction (*Hartog* v. *Memory,* 116 U. S., 588), or to suggest in the remotest way the objection now urged for the first time. It was wholly unnecessary to allege diversity of citizenship in the original complaint in the State Court, and the controversy was drawn within the Federal Court

at the instigation of the defendant below: both the original (8) and the Amended Complaint (19) showed the dead man's wife and child to have been residents of Italy; and if, in a case transferred to a Federal Court upon the application of defendant, it were necessary to set up diverse citizenship, if in such a case the defendant could be heard to complain of the absence of such an allegation, and if the objection had been plainly, clearly, specifically and promptly made at the time, it could readily have been obviated because "Jovetta Spina and Sunda Spina were subjects of the Kingdom of Italy" (Brief for plaintiff in error, p. 49): but no such objection was made, and we submit that it cannot now be raised for the first time in this Appellate Court.

The answer in the case, though brief, is not without certain interesting characteristics. It makes no denial of the first paragraph of the amended complaint, which sets forth the corporate character of the defendant; and indeed nothing appears anywhere throughout the record to indicate that any issue was made upon this subject matter. The answer then declares that the defendant has no information or belief to enable it to answer the allegations of paragraph II of the Amended Complaint, but it quite fails to deny all of the allegations of that paragraph. The answer does deny that by due or proper proceedings in the matter of the estate of Pietro Spina, sometimes known as Peter Spino, the present plaintiff was, by the Su-

perior Court of Merced County, appointed administrator of the estate of the deceased; and it further denies, for lack of information or belief, that the plaintiff qualified as such administrator as required by law, that letters of administration were issued to him, or that he has been or still is the duly appointed, qualified and acting administrator of the estate of the deceased; and it will thus be observed that by these denials an issue was raised by the defendant, to which issue the probate record (Record, 55-84), so unpleasant to defendant (Assignment of Error VI), was plainly responsive and relevant. But this answer, it will further be observed, nowhere attempts to deny "that on or about the first day of July, A. D. 1912, "upon premises owned, occupied, controlled and op- "erated by said defendant, in the County of Merced, "in the State of California, the above named Pietro "Spina, sometimes known as Peter Spino, died"; and these facts may therefore be regarded as unquestioned.

The answer then alleges that the defendant has no information or belief to enable it to answer the allegations of paragraph III of the amended complaint: but it does not deny all of the allegations of that paragraph. It does deny that the deceased was 35 years old at his death, that he was married, and that he left as sole heirs-at-law his wife and daughter; it also denies the dependence of the wife and daughter for support upon his earnings; and it also denies that his average earnings exceeded $50 per month, that he con-

tributed $50 per month to the support of his wife and child and that his death deprived the wife and daughter of his support. But this paragraph of the answer does not deny "that for a long time prior to " and at his said death, said decedent had been a farm " laborer by occupation and had no other source of " income except the wages earned by him in his said " occupation"; nor does it deny "that during all the " times prior to and at his said death, said deceased was " without independent means or fortune, and was de- " pendent for his support and maintenance, and the sup- " port and maintenance of his said wife and daughter, " upon his said wages earned in his said occupation " of laborer"; and these matters may also, we think, be regarded as unquestioned. It should, however, further be observed that this paragraph of the answer " denies that said decedent contributed to the support " and maintenance of his wife and child in the sum " of fifty (50) dollars for each and every month": but is not this negative plainly pregnant with the admission that he contributed in the sum of $49.99/100 for each and every month?

The next paragraph of the answer takes up the fatal occurrence and makes sundry denials concerning it: but these denials leave uncontested many of the facts alleged by the plaintiff. Thus, the following facts are nowhere denied:

> "Prior to and on said first day of July, 1912, " said defendant owned, occupied, controlled and " operated said Midway Camp or Ranch, and was

"engaged in harvesting a crop thereon; during said "time, and on said first day of July, 1912, said "decedent was employed by said defendant to "drive, and was then and there actually engaged in "driving for said defendant, a certain harvester "team composed of about 32 mules, and then and "there used in the aforesaid harvesting of the "aforesaid crop; during said times, and on said "first day of July, 1912, one Twining was em- "ployed by said defendant to follow and attend "said harvester and count and record the sacks as "they came from said harvester, and on said first "day of July, 1912, said Twining was actually en- "gaged in his said employment, and, for the pur- "pose of enabling said Twining to perform the "duties of his said employment, said defendant "furnished him with a horse for use in that re- "gard" (Record, pp. 20-21).

And in addition to this, the fact of the runaway of the mule team; the fact that the deceased was *thrown,* and the fact that he was killed, cannot, we think, be regarded as denied or contested facts by anyone who reads this language:

"But on the contrary the said defendant alleges "that said team ran away and the said decedent "was *thrown* and killed without any carelessness or "negligence by the said defendant of any kind or "character whatsoever" (Record, pp. 27-8).

The remaining paragraphs of the answer deny the particulars of the negligence charged, deny the damage to the wife and daughter, and deny that the action is prosecuted in their behalf.

The answer then proceeds to set up, "as a further,

"separate and distinct defense," the contributory negligence of the deceased, charging the deceased with losing control of the team, and that he "negligently "and carelessly dropped or fell" from the harvester, thus receiving the injuries which caused his death. Of this portion of the answer, it is, we think, to be observed that it really admits that the mule team became frightened, that it ran, that the deceased did not continue in the harvester, that he received injuries and that those injuries caused his death. It will be observed that we are careful to use the cautious phrase "that deceased did not continue in the harvester," and we do so advisedly: because on page 28, line 2 of the Record, we are told by the answer that "said dece- "dent was *thrown,*" but on page 29, line 19, we learn that he "negligently and carelessly *dropped or fell.*" And while upon this subject of contributory negligence, it may as well be suggested here as elsewhere that the allegation of contributory negligence, is in its nature, a plea in confession and avoidance, being predicated upon the existence of negligence upon the part of the defendant, the responsibility for which the defendant seeks to avoid by charging contributory negligence upon the part of the person injured or killed. In other words, contributory negligence upon the part of the plaintiff, necessarily presupposes negligence upon the part of the defendant; and the fol-

lowing are some of the authorities which support this view:

Watkinds v. *S. P. Co.*, 38 Fed., 711;
Crabbe v. *Mammoth Mg. Co.*, 168 Cal., 500;
McCarthy v. *Louisville Ry.*, 14 So. (Ala.), 370;
Louisville Ry. v. *Sights*, 89 S. W. (Ky.), 132;
Scott v. *Seaboard Ry.*, 45 S. E. (S. Car.), 129;
Jones v. *Charleston Ry.*, 39 Id., 758;
Simms v. *S. C. Ry.*, 2 Id., 486;
Hummer v. *Ry.*, 108 S. W. (Ky.), 885;
Ry. Co. v. *Tippett*, 142 S. W. (Ark.), 520;
American v. *Spiss*, 117 Ill. App., 436;
Lime Co. v. *Affleck*, 79 S. E. (Va.), 1054.

The cause being thus at issue, it "came on for trial "on the 7th day of May, 1914, before the Court, "Hon. Edward S. Farrington presiding, and a jury, "and resulted in a verdict in favor of plaintiff for "the sum of five thousand (5000) dollars; that there- "after the defendant duly made a motion for a new "trial; and said court thereafter made its order set- "ting aside its verdict and granting a new trial of "said action" (Record, 34-5). Thereafter, on May 17, 1915, the cause came on for its second trial before Hon. Oscar A. Trippet and a jury.

Rule 22 of the rules of practice of the United States District Court for the Southern District of California, provides as follows:

"Rule 22. Bills of Exceptions to Charge of Court, When and How Made.—The party except-

ing to Charge of the Court, to the jury must specify distinctly the several matters of law in the charge to which he excepts. Such matters of law, only, will be inserted in the bill of exceptions, and allowed by the Court. All exceptions to the charge of the Court to the jury shall be specified in writing immediately on the conclusion of the charge, and handed to the Court before the jury leave the box. The bill of exceptions must be prepared in form, and presented to the Judge within ten days after verdict, and in default thereof, the exceptions will be deemed waived."

From a statement by the learned Judge of the court below, which statement was inserted by the learned Judge in the bill of exceptions, which statement dealt with the matter of exceptions to the instructions given, asked and refused on this second trial, and which statement will be the subject of discussion hereafter, the following appears:

"All the foregoing exceptions as to instructions "given, asked and refused, are allowed under the fol- "lowing circumstances, to wit: Rule 22 of the United "States District Court for the Southern District of "California, was not followed as it is written. No ex- "ceptions were noted before the jury left the box to "consider of their verdict, but the following did "occur at the trial: The following stipulation was "entered into in open court at the suggestion of the "Judge with regard to the taking of exceptions:

"THE COURT—Better have a stipulation here

" that the rule obtaining in the State Court shall apply " here, in regard to exceptions.

"MR. TREADWELL—I think so.

"MR. DUNNE—Then it may be stipulated that it " is not necessary for either side to take any exceptions " in the course of this trial to any ruling which may " be made by his Honor" (Rep. Trans., p. 22).

"After the Court charged the jury, and while the " jury was still in the box, the following stipulation " was entered into in open court at the suggestion " of the Court with regard to the taking of excep- " tions to the giving of its instructions and refusal of " instructions requested:

"THE COURT—The rule of court requiring ex- " ceptions to be noted at the time—it is generally the " practice to waive that and allow the exceptions to " be taken at a subsequent time. Will you stipulate " that may be done?

"MR. DUNNE—Yes, your Honor, if it is agree- " able to counsel on the other side.

"MR. SHORT—Yes" (Rep. Trans., p. 134).

"After the testimony was closed and the opening " argument made to the jury by counsel for plaintiff, " and before the argument by counsel for defendant, " the following occurred at the trial:

"MR. TREADWELL—If your Honor please, un- " der the peculiar practice of this Court, in addition " to the motion for a nonsuit, it is necessary to make " a motion, on the same grounds, to direct the ver-

" dict. I want the record to show that we made that " motion.

"THE COURT—All right" (Rep. Trans., p. 125).

"The Court is of the opinion that the plaintiff " stipulated as shown by the foregoing, that the ex- " ceptions could be noted as taken and shown in the " bill of exceptions; that this stipulation was not " only between the parties, but that the Court was " a party to it; that said stipulations were made in " the presence of the jury and before the jury retired " from the box to consider of their verdict; that said " stipulations had the force and effect of exceptions " noted, as required by Rule 22, in the presence of " the jury; that the requirement of Rule 22, or the " Statute of Westminster II, not being a constitutional " requirement, could be waived by stipulation and " estoppel. The defendant objects to the insertion " in the bill of exceptions of this statement containing " said stipulations, and insists that the bill of excep- " tions should be settled and the exceptions shown " without this statement. The plaintiff desires to with- " draw from said stipulations, and to have said ex- " ceptions stricken out of the bill of exceptions, and " the bill to state exactly what was done. The Court " is of the opinion that it is in duty bound to allow " said exceptions as aforesaid, and as noted in the " bill, but to state the exact facts in the bill of ex- " ceptions, as to what occurred. The Court is of the " opinion that all the elements of an equitable estop-

"pel are present here, even if the plaintiff is not "bound by said stipulations. So far as the trial court "is concerned, the plaintiff is not permitted to with- "draw from said stipulation. The objection of the "defendant to the insertion of this statement in the "bill of exceptions is overruled, and an exception is "allowed the defendant to this ruling of the Court" (Record, p. 128, line 30 to p. 131, line 11).

This second trial resulted in a verdict in favor of the plaintiff, and again for the sum of $5000. In accordance with this verdict, judgment was entered on May 18, 1915; and thereafter, the writ of error was sued out which removed the cause to this court.

On pages 2-3 of the brief for plaintiff in error herein reference is made to what it has pleased plaintiff in error to describe as "the three claims of negli- "gence . . . . alleged in the complaint." We respectfully protest against this statement of the defendant, and we point to our amended complaint for the charges of negligence which we make against this defendant. In paragraph IV of that complaint, we claim that the horse which confessedly the defendant furnished to Twining was, not solely a "vicious" horse, but was "a restive, fractious, vicious, frisky ani- "mal, not easily controlled, liable to run away, and a "dangerous animal with which to approach said har- "vester team because of its frightening said mules." And in the same paragraph, the plaintiff further complains that in approaching the harvester team with

this dangerous and frightening horse, the boy Twining did so "without any effort to manage, restrain, "control or quiet said horse, and failed and neglected "to take any precautions in the care and driving of "said horse to avoid the frightening of said harvester "team." And in paragraph V of said complaint, the plaintiff charges "negligence of defendant in failing "and neglecting to take reasonable and proper pre-"cautions to protect said defendant," and "negligence "of defendant in failing and neglecting to supply "and provide proper, adequate and safe appliances "and instrumentalities for the conduct of its opera-"tions," and "negligence of defendant in failing and "neglecting to provide said decedent with a safe "place of work," and "negligence of defendant in "causing and permitting said Twining to use said "dangerous and frightening horse," and "negligence "of defendant in failing and neglecting to provide "said Twining with such a safe and gentle horse as "would enable him to approach said harvester team "without frightening it." In view of these various specific charges of negligence, insistence upon no one of which is in any wise abated by us, we feel that we have a right to protest against the attempted enumeration of charges of negligence contained in our opponent's brief.

And we may add here that the Roseberry compensation law seems to have attracted the attention of the plaintiff in error: it is referred to on pages 3, 6,

53-7, and 59-60 of its brief; and when we discuss the Twelfth assignment of error, we shall state our views concerning it.

THE ASSIGNMENT OF ERRORS.

The Assignments of alleged error are vague, general, indefinite, unspecific, lacking in particularity, and without foundation in the Bill of Exceptions: they attempt to supply deficiencies in the record below, and to import new matter into the record here; and for these reasons, they should be disregarded, the writ of error dismissed, and the judgment affirmed.

In approaching the consideration of this cause, we respectfully insist that very many, indeed, of the assignments of error cannot be considered; and if we are correct about this, the scope of the inquiry upon this writ of error will become very much restricted. The settled rule is that the judgment of the Court below will be taken to be correct, that an Appellate Court cannot presume error, that error (if any), must appear affirmatively before there can be a reversal, and that it is not sufficient to produce a record from which it does not affirmatively appear whether the judgment below was right or wrong (*Townsend* v. *Jemison,* 48 U. S. (7 How.), 706; *Simpson* v. *Baker,* 67 Id. (2 Black.), 581; *Cliquot* v. *U. S.,* 70 Id. (3 Wall.), 114; *Boley* v. *Griswold,* 87 Id. (20 Wall.), 486; *Loring* v. *Frue,* 104 Id., 223); and this principle has been applied to pleadings (*Garnhart* v. *U. S.,* 83 U. S. (16 Wall.), 162), and to the legality of the

evidence upon which a verdict was based (*Penn. Co.* v. *Roy,* 102 U. S., 451), and to the admission of evidence (*Murray* v. *Louisiana,* 163 U. S., 101), and to the exclusion of evidence (*Penn. Ry.* v. *Stimpson,* 39 U. S. (14 Pet.), 448), and to the sufficiency of the evidence to sustain the judgment (*Thompson* v. *Ferry,* 180 U. S., 484), and to the correctness of the instructions (*Wiggins* v. *Burkham,* 77 U. S. (10 Wall.), 129; *Corinne, etc. Co.* v. *Johnson,* 156 Id., 574)—even to the extent that where the record does not contain all the instructions, it is to be assumed that any others needed were given (*Bennett* v. *Harkrader,* 158 U. S., 441), and to the propriety of the verdict (*Gregory* v. *Morris,* 96 U. S., 619). In a word, the judgment of the court below is a valuable property right of the plaintiff, and he is entitled to have it remain unimpaired except by strictly legal means (*Johnson* v. *Gebhauer,* 159 Ind., 271; *Livingston* v. *Livingston,* 173 N. Y., 377).

From this consideration, there follows the equally well settled rule, that upon a writ of error, no assignment of error can be considered which fails to comply with the rules, or which fails to rest upon a foundation visible in the bill of exceptions. The controlling rule here is rule 11 of the rules of the Circuit Court of Appeals, which, similarly to rule 35 of the rules of the Supreme Court, requires that each assignment of error shall set out, not only separately, but also *particularly,* each error asserted and *intended to be*

urged. We submit, however, that this rule cannot be complied with by filing assignments so vague, obscure and indefinite that they are mere generalities; and we submit that assignments which do not state the concrete particulars, which could not withstand a demurrer for uncertainty, if they were allegations in a pleading, and which leave court and counsel to grope in the dark for some clue to the meaning, do not satisfy a rule which requires that each error intended to be urged shall be *"particularly"* set out.

We believe that the rule that an assignment of error should be so specific that the understanding and attention of the court are at once arrested and directed to the particular error intended to be urged, without being forced to search the record to determine it, and that indefinite and general assignments will not be noticed, is fully sustained, not only by the rule, but also by the adjudications:

Great Creek Coal Co. v. *Farmers L. & T. Co.,* 63 Fed., 891, 894:

No "looking beyond."

Van Gunden v. *Va. C. & I. Co.,* 52 Id., 838, 840:

No "looking beyond."

Woodbury v. *Shaneetown,* 74 Id., 205, 206:

Specification *proves* nothing.

Fla. etc. Ry. v. *Cutting,* 68 Id., 586, 587:

General assignments condemned.

U. S. v. *Ferguson,* 78 Id., 103, 105:

General assignments condemned.

Western Coal Co. v. *Ingraham,* 70 Id., 219, 222:

Duty to ask directed verdict at the close of the whole evidence, if no evidence of negligence presented.

Doe v. *Waterloo Mg. Co.,* 70 Id., 455, 461:

General assignments not aided by the brief.

Haldene v. *U. S.,* 69 Id., 819, 821:

Indefinite specifications bad.

Crosby v. *Emerson,* 142 Id., 713, 719:

Indefinite specifications bad.

City of Lincoln v. *Sun Vapor Co.,* 59 Id., 756, 759:

Errors must be distinctly specified.

Piper v. *Cashell,* 122 Id., 616:

Particular specifications necessary.

Esterly v. *Rua,* 122 Id., 609:

Particular specification necessary.

W. U. Tel. Co. v. *Winland,* 182 Id., 494:

Indefinite assignment bad.

Deering Harvester Co. v. *Kelly,* 103 Id., 262:

General assignments not noticed.

The Myrtle M. Ross, 160 Id., 19:

General assignments not noticed.

Garrett v. *Pope Motor Car Co.,* 168 Id., 905:

General assignments not noticed.

In addition to this, how can any assignment be considered for which no foundation was laid in the bill of exceptions? The function of an assignment of errors is not to import into a record some alleged error which does not appear in the bill of exceptions: the assignment of errors can be no broader than the bill of exceptions; and as Mr. Foster puts it: "The "assignment of errors cannot supply an omitted ex- "ception" (3 *Foster Fed. Pr. Last Ed.,* p. 2478, n. 5). For this reason, it was held in *Tucker* v. *U. S.,* 151 U. S., 164, 170, that "the other instructions to which "the defendant objected are not subject to review, "because the bill of exceptions does not show that "he excepted to them." And so, likewise, in *Lindsay* v. *Turner,* 156 U. S., 208, it was held that where errors are assigned to portions of the charge to the jury, but no exceptions are preserved thereto, no questions are raised for the consideration of the Appellate Court thereon. It is both good law and good sense that neither a petition for a writ of error, nor an assignment of errors, can "supply deficiencies" in the record of the court below (*Harding* v. *Illinois,* 196 U. S., 28), nor can the assignment of errors "bring into the record any new matter for . . .

"consideration" (*Waters-Pierce Oil Company* v. *Texas,* 212 U. S., 112, 115-6),—you cannot raise a new issue by an assignment of error (*Davis* v. *McEwen Bros.,* 193 Fed., 305).

Since, therefore, the basis and foundation for the assignment of errors is to be discovered, if at all, in the bill of exceptions, it may be proper to remark that the time and manner of taking exceptions and filing bills of exceptions are matters as to which the Federal Courts act independently of state statute and practice (2 *Foster Fed. Prac.,* page 1588, sec. 479; *Ex parte Chateaugay Iron Co.,* 128 U. S., 544; *Fishburn* v. *Chicago, etc. Ry.,* 137 Id., 60); and also to point out that, in the Federal Courts, not only must the grounds of the objection be stated, but in the event of an adverse ruling upon an objection, or in the event of any action by the court deemed to be adverse to complaining party, a proper exception, taken promptly at the time, is indispensable to a review of the disputed matter by the appellate court; and if no such exception be taken, no review can be had in the Appellate Court, and by consequence the action or matter complained of has no place in the bill of exceptions or the assignment of errors, any state statute or any state practice to the contrary notwithstanding. This proposition is fully supported by the following authorities among others:

Laber v. *Cooper,* 74 U. S. (7 Wall.), 565:

objection must be made at trial;

N. H. Co. v. *Pace,* 158 U. S., 36:
necessity of exception;

Tabor v. *Bank,* 62 Fed., 383:
objection and its grounds;

Potter v. *U. S.,* 122 Id., 49, 55:
exception indispensable;

Thomas China Co. v. *C. W. Raymond Co.,* 135 Id., 25:
objection must be stated at trial;

Prioleau v. *U. S.,* 143 Id., 320:
exception necessary;

Fidelity & Casualty Co. v. *Thompson,* 154 Id., 484, 485:
exception must be reserved;

Robinson v. *Denver City Tramway Co.,* 164 Id., 174, 176:
failure to except fatal;

American S. & F. Co. v. *Karapa,* 173 Id., 607, 608, 609:
exception indispensable;

Chicago etc. Ry. v. *Frye-Bruhn Co.,* 184 Id., 15, 18:
exception indispensable to review;

Gibson v. *Luther,* 196 Id., 203, 205:

without proper exception, nothing for review by appellate court;

Board of Com'rs. v. *Home Savings Bank,* 200 Id., 28, 35:

exception indispensable.

We take the liberty of inserting here a typical quotation from the case last cited:

> "The office of an exception, in practice, is to "challenge the correctness of the rulings or decisions "of the trial court promptly when made, to the "end that errors in such rulings may be corrected "by the court itself, if, upon its attention being "called thereto, it deems them to be erroneous; "and to lay the foundation for their review, if "necessary, by the proper appellate tribunal. In "the courts of the United States such an exception, "taken immediately upon the ruling being made, is "indispensable to a review by the proper appel-"late court of the ruling."

We remarked above that objections and exceptions must be made and taken at the trial: and in this connection, we wish to urge that exceptions must not only be promptly taken at the time, responsively to a legally adequate objection, but objections made or exceptions taken after the jury shall have retired, cannot be con-

sidered; and in support of this proposition, the following authorities may be referred to:

Klaw v. *Life Pub. Co.* 145 Fed., 184: Second Circuit:

> "The practice of undertaking to reserve excep-
> " tions after the jury has retired, has been con-
> " demned by the Supreme Court."

Mann v. *Dempster,* 179 Fed., 837: Second Circuit:

Rule enforced.

Mann v. *Dempster,* 181 Fed., 76: Second Circuit:

Enforcing the rule although the adversary consented to have the exceptions considered.

Starr Co. v. *Madden,* 188 Fed., 910: Second Circuit:

Holding that the record must show that the exceptions were reserved while the jury were at the bar.

But, in none of the Circuit Courts of Appeal has this rule been enforced more consistently than in this:

W. U. Tel. Co. v. *Baker,* 85 Fed., 690: Ninth Circuit:

Applying the rule even where by the practice and rulings of the Trial Court such exceptions were not allowed to be taken in the presence of the jury.

Mount. Copper Co. v. *Van Buren,* 133 Fed., 1: Ninth Circuit:

Applying the rule even though the court offered to have the records show that the exceptions were re-

served in the presence of the jury, and emphasizing the necessity of enforcing the rule.

Copper River Co. v. *Heney,* 211 Fed., 459: Ninth Circuit:

Holding that exceptions not only to the instructions given, but also to the refusal of requests for instructions, taken after the verdict has been returned, are unavailing.

Beatson Copper Co. v. *Pedrin,* 217 Fed., 43: Ninth Circuit:

Rule stated and enforced although counsel stipulated, in the presence of court and jury, before the jury retired, that the exceptions might be reserved at a later date.

With these principles in mind, let us examine the assignment of errors in the case at bar. The first of these assignments purports to be directed to a question which we are unable to find in the bill of exceptions. We cannot assume that the question quoted in this assignment is the same question which appears a little below the middle of page 39 of the Record; and this, for two reasons, first, because the language of the two questions is quite different; and secondly, because the difference in the language of the questions is accentuated by the difference in the objections made to the two questions. On the one hand, the bill of exceptions does not disclose the question

quoted in assignment number 1; and, on the other hand, assignment number 1 does not predicate or assign any alleged error upon the question which appears in the bill of exceptions; and consequently, we think, either way assignment number 1 is bad. And even if we were to go the length of assuming the identity of these two questions, notwithstanding their differences, still, that would not assist the plaintiff in error. Errors not assigned, will not be considered (*Russell* v. *Huntington Bank,* 162 Fed., 868; *N. Y. L. I. Co.* v. *Rankin,* Id., 103), and rulings are not reviewable if not assigned as error (*Bell* v. *U. P. Ry.,* 194 Fed., 366); and therefore, since the assignment of errors is the assignment of the errors "intended to be urged" (Rule 11), since the assignment in question abandons all grounds of objection except "immateriality," and since "immateriality" as a ground of objection is meaningless and of no legal value, it follows, we think, that no proper foundation for this assignment of error, number 1, anywhere exists.

It may just as well be urged here as elsewhere upon the attention of the court that where no ground of objection to testimony is set forth, the objection is unavailing (*Toplitz* v. *Hedden,* 146 U. S., 252): vague objections to testimony are without weight before an Appellate Court, because they should point out some specific defect, and because the objector is confined to his specific objection (*Dist. Col.* v. *Woodbury,* 136 U. S., 450; *Moore* v. *Bank,* 38 Id. (13

Pet.), 302; *Woodbury Co.* v. *Keith,* 101 Id., 479); and where the party claiming injury specifies his objection, it must be considered that all others are waived, or that there was no ground upon which the others could stand (*Evanston* v. *Gunn,* 99 U. S., 660). From these views, we submit that it follows that "such a general dragnet as 'incompetent, irrelevant "and immaterial'" (*Sigafus* v. *Porter,* 84 Fed., 430, 435), must be condemned as bad for failure to specify "wherein or how, or why" (per Dunne, C. J., in *Rush* v. *French,* 25 Pac. (Ariz.), 816), and as being "a specimen of a practice not to be encouraged, which "is to object with a rattle of words that conceal the "real nature of an objection capable of being re-"moved on the spot, and to announce its true char-"acter for the first time in the Appellate Court" (*N. Y. etc. Co.* v. *Blair,* 79 Fed., 896). And in condemning the objection "immaterial, irrelevant and incompetent" as unspecific and inadequate to raise any issue, Mr. Justice Field said:

> "The objection to the introduction of the arti-"cles of incorporation at the trial was that they "were 'immaterial, irrelevant, and incompetent' "evidence. The specific objection now urged, that "they were not sufficiently authenticated to be "admitted in evidence, and that the certificates "were made by deputy officers, is one which the "general objection does not include. Had it been "taken at the trial and deemed tenable, it might "have been obviated by other proof of the corpo-"rate existence of the plaintiff or by new certifi-"cates to the articles of incorporation. The rule is

"universal, that where an objection is so general "as not to indicate the specific grounds upon which "it is made, it is unavailing on appeal, unless it be "of such a character that it could not have been "obviated at the trial. The authorities on this "point are all one way. Objections to the admis- "sion of evidence must be of such a specific char- "acter as to indicate distinctly the grounds upon "which the party relies, so as to give the other side "full opportunity to obviate them at the time, if "under any circumstances that can be done."

Noonan v. *Caledonia Gold Min. Co.,* 121 U. S., 393, 400.

And in further support of these views see:

Patrick v. *Graham,* 132 U. S., 627, 629;
Dist. Col. v. *Woodbury,* 136 Id., 450, 462;
Toplitz v. *Hedden,* 146 Id., 252, 255;
Chicago Ry. v. *De Clou,* 124 Fed., 142;
Guarantee Co. v. *Phoenix Ins. Co.,* Id., 170;
Davidson S. S. Co. v. *U. S.,* 142 Id., 315;
Shandrew v. *Chicago Ry.,* Id., 320, 321-2;
Sparks v. *Territory,* 146 Id., 371;
Am. Car. Co. v. *Brinkman,* Id., 712.

In *Burton* v. *Driggs,* 87 U. S., (20 Wall.), 125, it is said "that it is a rule of law that when a party "excepts to the admission of evidence, he must state "the specific objections, or it cannot be made the basis "of error"; and it must further appear that the objections assigned were assigned in the court below and seasonable exceptions taken: but a general ob-

jection to the admission or rejection of evidence does not comply with the rule, and unless the ground of objection upon which the assignment is based is specifically set out, the assignment will not be considered (*Haldane* v. *U. S.,* 69 Fed., 819; *Erie Ry. Co.* v. *Schomer,* 171 Id., 798-805; *Pioneer S. S. Co.* v. *Jenkins,* 189 Id., 312). Inasmuch, therefore, as neither the bill of exceptions, nor this assignment number 1 discloses any proper or specific ground of objection to either of the questions to which we have referred, it follows, we think, that this assignment should be disregarded.

The second assignment of error is even worse than the first: it is open to the criticism which we have directed against the first: the objections claimed were never made; and no exception whatever was reserved to any ruling. An examination of the bill of exceptions at the top of page 40 of the Record, will clearly show the absence of any objection or exception: and this assignment of error itself makes no claim whatever that any exception was reserved. In other words, the indispensable foundation for the assignment of error is entirely lacking.

The third assignment is equally bad, we submit. The one ground of objection relied upon,—the only alleged error "intended to be urged,"—is that the question and answer were "immaterial" to any issue in the case; and, as we have already seen, such a ground as this is wholly unspecific, entirely too vague,

general and indefinite, and furnishes no basis for an assignment of error.

The fourth assignment of error, is, we submit, even worse. When we turn to page 40 of the Record, line 6, from the bottom, we discover that the bill of exceptions exhibits no objection whatever to this testimony, whether upon the ground of immateriality, or upon any other ground. The plain fact about the matter is that the bill of exceptions at the place cited affirmatively shows that neither objection nor exception was taken to the testimony; and consequently no foundation was laid in the bill of exceptions for this assignment of error. Besides this, the assignment itself is so vague, indefinite, unspecific and lacking in particularity, and is such an evident attempt to utilize the assignment of errors for the purpose of importing new matter into the cause, that this assignment, like the others, should, we submit, be disregarded.

The same criticism is true of the fifth assignment of error. An examination of the bill of exceptions will disclose that the defendant never did move to strike out all or any of the answers in paragraphs 1, 2, 3 and 4 of the assignment of errors, whether upon the ground set forth in said paragraphs, or on any other ground whatever; and an examination of the bill of exceptions will further disclose that no such motion ever was denied by the court, and further that the defendant never excepted to any ruling of the court below denying any such motion. In brief,

no foundation whatever for this assignment of error can be discovered in the bill of exceptions, and it is only another instance wherein an attempt is made in the assignment of errors to "supply deficiencies" (*Harding* v. *Illinois,* 196 U. S., 28) in the record of the court below, and to import into the record on error matter which is wholly unjustified by the record below.

The sixth assignment of error deals with the admission of the probate record. The bill of exceptions does show, on page 55 of the Record, that an objection was taken and an exception reserved to the admission of this probate record, the ground being that the probate proceedings were in the name of Peter Spino, whereas the name of the deceased in this case was Pietro Spina. The fact, however, is, as an examination of the Record of the court below in this cause, and of the probate record, and of the amended complaint and the answer in the present case will demonstrate, that the deceased was known by both names, not only as Pietro Spina, but also as Peter Spino. This fact is shown affirmatively by all of the documents mentioned.

The seventh assignment of error is also objectionable, and should, we submit, be disregarded. The bill of exceptions, on page 41 of the Record, shows that an objection was taken and exception reserved to the ruling of the court permitting the question quoted to be asked: but the objections made to the question

were so vague, indefinite and unspecific within the doctrine of the authorities which we have heretofore cited, that those objections, we submit, furnish no basis for the present assignment of error. We have heretofore called attention to the decisions of the courts condemning the dragnet "incompetent, irrelevant and immaterial": the objection that the question calls for the conclusion of the witness nowhere attempts to specify any particular vice in the question; and the objection that no foundation was laid for the question wholly fails to designate in what respect, or to what extent, a proper foundation was lacking. As the courts have said over and over again, if the objection had been specific in character, no doubt it would have been obviated on the spot; and a mere "rattle of words," we submit, cannot be used to confuse or obscure in the lower court the real point (if any) of the objection and to conceal it until disclosed in the Appellate Court.

The eighth assignment of error has no foundation whatever in the bill of exceptions. An examination of the bill of exceptions, near the bottom of page 41 of the Record, will not disclose any objection to any such question as that quoted in the eighth assignment of error, whether upon the grounds asserted, or upon any other ground, or any exception to any ruling of the court below upon the question quoted. Moreover, this assignment of error is open to all of the objections and subject to all of the criticism which we have urged against the seventh assignment of error.

We are unable to find in the bill of exceptions the question quoted in the ninth assignment of error. We do find on page 49 of the Record, just below the middle of the page, a question in which the words quoted as a question in the ninth assignment of error are included: but whether the question objected to according to the bill of exceptions is the same question referred to in the ninth assignment of error, we are unable to decide. If it should be taken, however, that the question referred to in the ninth assignment of error was intended as a reproduction of the question referred to on page 49 of the Record, then this ninth assignment of error is open to all of the objections and subject to all of the criticisms which we have ventured to formulate as against the seventh and eighth assignments of error.

Then come those assignments of error which deal with the charge to the jury. They include assignments numbered from ten to twenty-three, both inclusive; and in our opinion, no one of these assignments should be considered by the court in disposing of the present writ of error. It may be pointed out that assignments of error to instructions asked or refused will be disregarded where they do not "refer to the "evidence that shows the relevancy to the proposition "of law sought to be charged" (*Newman* v. *Virginia, etc. Co.* 80 Fed., 228; *Union Casualty Co.* v. *Schwerin,* Id., 638; *Chicago, etc. Co.* v. *Bennett,* 181 Id., 799, 800; *Chapman* v. *Reynolds,* 77 Id., 274; *Western M. C. L. Co.* v. *Scaife,* 80 Id., 352); but none of these

assignments of error comply with this rule, and for the most part, they content themselves with the vague statement that the instruction correctly stated the law and was not in any form given by the court to the jury. In the next place, although an assignment of error should be specific in its character, still, it will not be considered if based upon a general exception in the court below (*Vider* v. *O'Brien,* 62 Fed., 326; *Erie Ry. Co.* v. *Kennedy,* 191 Id., 332; *Baltimore* v. *Maryland,* 166 Id., 641; *Garrett* v. *Pope Motor Car Co.,* 168 Id., 905; *Pickham* v. *Wheeler Bliss Mfg. Co.,* 77 Id., 663); and, *a fortiori,* assignments of error with relation to the charge to the jury cannot be considered unless based upon objections properly made and exceptions equally properly reserved before the jury retired (*Star Co.* v. *Madden,* 188 Fed., 910; *Wabash Screen Door Co.* v. *Lewis,* 184 Id., 260; *St. Louis, etc. Ry. Co.* v. *Underwood,* 194 Id., 363). And this rule is in consonance with the rule 22 of the rules of the United States District Court for the Southern District of California, above quoted, and with the settled doctrine established by the authorities already cited, that exceptions to the charge, and to the action of the court, in giving, modifying or refusing proposed instructions, must be taken while the jury is at the bar, the latest expression of opinion upon this subject by this court being found in *Beatson Copper Co.* v. *Pedrin,* 217 Fed., 43. But it appears from the statement of the learned Judge of the court

below inserted in the bill of exceptions that not only was rule 22 not followed as it is written, but "no "exceptions were noted before the jury left the box "to consider of their verdict" (Record, p. 129). From the same page of the Record, it appears that after the Court had charged the jury, and while the jury was still in the box, the Court asked a question of counsel, as follows:

"THE COURT—The rule of court requiring ex- "ceptions to be noted at the time— It is generally "the practice to waive that and allow the exceptions "to be taken at a subsequent time. Will you stipu- "late that may be done?

"MR. DUNNE—Yes, your Honor, if it is agree- "able to counsel on the other side.

"MR. SHORT—Yes."

In other words, the same situation is presented here as was presented in *Beatson Copper Co.* v. *Pedrin,* 217 Fed., 43, where counsel stipulated in the presence of the Court and jury, before the jury retired, that the exceptions might be reserved at a later date. The learned Judge of the court below seemed to think that his question to counsel, and the replies of counsel to that question, constituted a "stipulation," and "that this stipulation was not only between the par- "ties, but that the court was a party to it": but, if it were a stipulation, it was no more a stipulation that the stipulation in the Beatson case, and the court be-

low in the present cause was no more a party to that stipulation than was the trial Judge in the Beatson case. In other words, we are unable to distinguish the present situation from that involved in the Beatson case; and upon the authority in that case we respectfully insist that settled rules of law are not to be stipulated away at the pleasure of the parties, whether in response to a question by the learned Judge of the court below, or otherwise. In *W. U. Tel. Co.* v. *Baker,* 85 Fed., 690, this court applied the rule for which we are contending even though the practice and rulings of the trial court there did not permit exceptions to be taken in the presence of the jury: in *Mountain Copper Company* v. *Van Buren,* 133 Fed., 1, this court applied the rule for which we are contending, even though the court offered to have the record show that the exceptions were reserved in the presence of the jury: in *Copper River Co.* v. *Heney,* 211 Fed., 459, this court applied the rule for which we are contending not only to exceptions to the instructions given, but also to exceptions to the refusal of requests for instructions; and in *Beatson Copper Co.* v. *Pedrin,* 217 Fed., 43, this court enforced the rule for which we are contending although counsel actually stipulated in the presence of the Court and jury, before the jury retired, that the exceptions might be reserved at a later date; and the same doctrines, as we have already seen, are enforcd in other circuits. We think, therefore, that it was not competent for the

parties to enter into any such so-called "stipulation," and that, whatever the parties may have thought at the time, the forms and modes of procedure of the Federal Courts are not to be altered or modified in accordance with so-called "stipulations" of the parties.

We submit that the twenty-fourth and twenty-fifth assignments of error should not be considered by this court. The refusal to instruct a verdict for the defendant at the close of the plaintiff's evidence is good ground for error, if the defendant rests his case on the plaintiff's evidence and introduces none in his own behalf (*Grand Trunk Ry.* v. *Cummings,* 106 U. S., 700; *Accident Ins. Co.* v. *Crandal,* 120 Id., 527); but upon the introduction of evidence by the defendant, exceptions to an order denying a motion for the nonsuit or denying a motion to instruct the jury to render a verdict in favor of the defendant and against plaintiff are waived (2 *Foster Fed. Pr.*, p. 1555-6, n. 64; *Fulkerson* v. *Improvement Co.,* 122 Fed., 982; *Coeur d' Alene Lumber Co.* v. *Goodwin,* 181 Id., 951; *Philadelphia Casualty Co.* v. *Techheiner,* 220 Id., 401, 407; *Columbia, etc. Ry.* v. *Means,* 136 Id., 83; *Cotton Mills* v. *Cotton Co.,* 156 Id., 225, 232); and consequently, an assignment that the court erred in denying the motion of the defendant for a nonsuit, or the motion of the defendant to instruct the jury to render a verdict in favor of the defendant and against the plaintiff, is bad and will not be considered, when the exception taken to the ruling neither recites nor shows that it contains all the evidence (*Chicago* v. *Troy*

Laundry Mch. Co., 162 Fed., 678). And, in common with the other assignments of error, these two assignments cannot, we submit, be considered, because entirely too vague, indefinite, unspecific and lacking in particularity.

The next assignment of error, number twenty-six, purports to deal with the insufficiency of the evidence to justify the verdict, but no attempt is made to indicate wherein or how or why any of the evidence is insufficient to justify any finding referred to. General and unspecific assignments of this character will not be considered, because they do not conform to the rule (*Chicago, etc. Ry.* v. *Anderson,* 168 Fed., 902; *Ireton* v. *Pa. Co.,* 185 Id., 84; *W. U. Tel. Co.* v. *Winland,* 182 Id., 493).

The last of these assignments of error is the twenty-seventh, and it purports to assign error upon the verdict of the jury in favor of the plaintiff and against the defendant. But an assignment of error that the court erred in overruling the defendant's motion for a new trial and entering judgment for plaintiff, is too general and indefinite to be considered (*W. U. Tel. Co.* v. *Winland,* 182 Fed., 494): an assignment that the court erred in rendering judgment against the defendant and in favor of the plaintiff, is likewise bad (*U. S.* v. *Ferguson,* 78 Fed., 103; *La. Ry.* v. *Levee Commissioners,* 87 Id., 594; *Supreme Lodge* v. *Withers,* 89 Fed., 160); and an assignment that the judgment is contrary to the law and the evidence, is likewise fatal (*Craig* v. *Dohr,* 145 Fed., 307); and in

line with the spirit of these rulings, we submit that an assignment that the jury returned a verdict in favor of the plaintiff and against the defendant, which verdict the plaintiff in error assigns as error as being against law, is likewise bad and cannot be considered. Moreover, no foundation is laid in the bill of exceptions for this assignment of error: it nowhere appears that at the time when the jury returned their verdict, the defendant either objected or excepted to that verdict. The verdict of the jury was rendered on May 18, 1915 (Record, p. 31): but the first intimation or statement anywhere contained in the record upon this writ of error that the defendant either objected or excepted to the verdict, appears in the bill of exceptions, on page 131 of the record. This bill of exceptions was not prepared or presented prior to August 6, 1915, because the time within which the defendant might prepare and present its bill of exceptions in the case was extended to and including the 6th day of August, 1915 (Record, p. 131); and the bill of exceptions was not settled or filed until October 13, 1915 (Record, p. 136). It becomes therefore important to point out the recital in the bill of exceptions, on page 131 of the Record, that the jury returned a verdict which will be found in the judgment roll herein, "and to which verdict the defendant "*NOW* duly excepts"; and to point out the further significant recital in this assignment number twenty-seven to the effect that "the jury returned a verdict

"in favor of plaintiff and against defendant to which "verdict the defendant *THEREAFTER* duly excepted" (Record, p. 156). In other words, the rule which requires the prompt taking of objections and reservation of exceptions was not complied with, no foundation exists in the bill of exceptions for the present assignment of error, and the same should be disregarded by the court. Upon the whole, then, we respectfully submit that, since there are no proper assignments of error before this court upon this writ of error, the judgment herein should be affirmed.

GENERAL PRINCIPLES OF REVIEW.

The judgment will be regarded as correct: reversible error must be made to appear affirmatively upon the record: if any evidence be disclosed which might fairly sustain the verdict, or if the verdict be reached upon conflicting evidence, the verdict will remain undisturbed: in this court, the record must be considered in that aspect most favorable to the plaintiff below; and the action of the trial court in denying a new trial, will not be overlooked here.

We have already stated our objections to the assignments of error in the present cause; and if those objections are sound, and if in consequence thereof the assignments of error are disregarded, that, we take it, would be the end of this controversy. But we have no desire to stop here; and we wish now to proceed to discuss the cause at bar upon the hypothesis that these assignments of error are sufficient and adequate within the rules of law. In other words, we wish, for argumentative purposes only, to assume the sufficiency of

these assignments of error, and, upon that assumption, to consider the case at large. We have already seen that, in an Appellate Court, every presumption will be indulged in favor of the correctness of the judgment of the lower court: but the general principles of review do not stop with that bald statement; and, on the contrary, there are certain other rules which obtain in an Appellate Court, and which operate in aid and favor of the judgment. There is no antecedent presumption which we are aware of that the verdict of a jury is wrong: while the burden is upon the plaintiff to satisfy the jury of the defendant's liability, still, after a verdict for the plaintiff, the burden is on the defendant to make it clearly appear that the verdict was wrong (See, for example, *Coombs* v. *King,* Ann. Cas. 1912-C, 1121); and after a verdict for the plaintiff, and in the Appellate Court, not only do the ordinary rules as to the inferences which may be drawn fully apply, but those other rules to which we have referred likewise obtain. In other words, all presumptions are in favor of right rather than of wrong: a verdict will be presumed to be right until, by an affirmative showing upon the record, the contrary is established: every reasonable intendment will be indulged in favor of the correctness of the proceedings; and the presumption that the verdict was right becomes conclusive upon a failure of the record to disclose such real, substantial error as must necessarily have operated to the distinct prejudice of the

complaining party. We wish, now, briefly to formulate those other rules in aid of the judgment to which we have referred.

1. If this record disclose any evidence which, when fairly considered, might sustain the verdict, that verdict will not be disturbed: "unless the testimony was such that no "recovery can be had upon the facts shown in any view "which can be properly taken of them, the verdict and "judgment of the District Court must be affirmed."

Myers v. *Pittsburg Coal Co.,* 233 U. S., 184, 193;
U. S. Express Co. v. *Ware,* 87 Id. (20 Wall), 543;
Prentice v. *Zane,* 49 Id. (8 How.), 470;
Humes v. *U. S.,* 170 Id., 210;
Lancaster v. *Collins,* 115 Id., 222;
Standard Oil Co. v. *Brown,* 218 Id., 78.

The independence of the jury is everywhere guarded with a jealousy that is conditioned only by the protection of litigants from verdicts so improper, or so unjust, that the court can see either that some very gross mistake has occurred, or that some illegitimate motive, bias or feeling has intruded itself into the jury box (*Bayliss* v. *Ins. Co.,* 113 U. S., 316; *Dunlop* v. *U. S.,* 165 Id., 486; *Myers* v. *Pitts. Coal Co.,* 233 Id., 184; *Post* v. *U. S.,* 135 Fed., 1, 11-12; *Davis* v. *Memphis City Ry.,* 22 Id., 883, 887): it was for the jury to determine whether there was any negligence of the defendant which brought about the death of the de-

ceased; no sufficient reason is perceived by us why that issue should be treated differently from any other issue which comes before a court; and in our opinion the sane view of the matter is that the law does not require demonstration (Code of Civil Procedure, sec. 1826), upon this issue any more than upon any other issue presented for adjudication. In a word, the question as to the existence of negligence was for the jury, and if this record contain any facts from which the inference of negligence might be drawn, this Court will not interfere with the verdict, no matter what its own views may or may not be. When, in *Reay* v. *Butler,* the appellant contended in substance that the Appellate Court should sit practically as a *Nisi Prius* Court, and draw its own conclusion from the evidence, regardless of the conclusions reached by the jury, the Supreme Court, replying to that contention, remarked that:

> "It has been held here in more than one hundred cases, commencing with *Payne* v. *Jacobs,* 1 Cal., 39, in the first published book of reports of this court, and ending with *Dobinson & McDonald,* 92 Cal., 43, in the last volume of such reports, that the finding of a jury or a court as to a fact decided upon the weight of evidence will not be reviewed by this court; and so, the general rule is clearly established."

Reay v. *Butler,* 95 Cal., 206, 214.

2. A verdict reached upon conflicting evidence will not be disturbed by the Appellate Court.

Alaska Packers' Ass'n. v. *Domenico,* 117 Fed., 99;
The Oscar B, 121 Id., 976;
Paauhau Plant. Co. v. *Palapala,* 127 Id., 920;
Barton Bros. v. *Texas Produce Co.,* 136 Id., 355;
Coast Wise Co. v. *Baltimore Co.,* 148 Id., 837.

There is good reason for this rule; because where a case fairly depends upon the effect or weight of the testimony, it is one for the consideration and determination of the jury (*Semet-Solway Co.* v. *Wilcox,* 143 Fed., 839); and if different minds might draw different conclusions or inferences from the facts proved, or if there be doubt as to the proper inference to be drawn, the proper inference is to be settled by the verdict of the jury (*Prentice* v. *Zane,* 49 U. S. (8 How.), 470; *Sioux City Ry.* v. *Stout,* 84 Id. (17 Wall.), 657; *Aetna L. I. Co.* v. *Ward,* 140 Id., 76, 91; *Beatty* v. *Life Ins. Ass'n.,* 75 Fed., 65, 68). So rigidly is this rule enforced, that even in cases where there is a preponderance of evidence against the verdict, still the verdict will not be disturbed (*Burch* v. *S. P. Co.,* 145 Fed., 443), nor will the verdict be disturbed because the defendant is dissatisfied with it (*Fabricant* v. *Phila. Ry.,* 138 Fed., 976); nor will it be disturbed because of the views of the Appellate Court itself as to the merits of the action (*Ill. Central Ry.* v. *Foley,* 53

Fed., 459; *Wertheim Coal Co.* v. *Harding,* 145 Id., 660; *Aetna Life Ins. Co.* v. *Ward,* 140 U. S., 76, 91). There are numerous other cases to the same effect which might be cited: but no rule is better settled than this, or has a surer foundation; and its roots are to be found in the constitutional provision conserving the right of trial by jury, and in the fitness of twelve men, selected from the average of the community, for the purpose of passing upon questions of negligence (*Herbert* v. *S. P. Co.,* 121 Cal., 227, 229; *Wahlgren* v. *Market St. Ry.,* 132 Id., 656, 663-4). Thus, the general attitude of the federal courts upon this matter may be well illustrated by the following brief excerpt from *Illinois Ry.* v. *Foley, supra*:

> "That the evidence tended to establish negligence was enough to make it the duty of the court to submit that issue to the jury. Where negligence may be fairly deduced or inferred from proved or conceded facts, the case must be left to the jury. Neither this, nor any other court can set aside the verdict of a jury simply because the court would have reached a conclusion different from that of the jury upon the facts. To do so would be to usurp the functions of the jury."

3. **In determining in an Appellate Court questions of the character of those involved in the cause at bar, the testimony must be considered in its most favorable aspect to the plaintiff below.**

Myers v. *Pittsburg Coal Co.,* 233 U. S., 184, 193;
Hepburn v. *Dubois,* 37 U. S. (12 Pet.), 345.

In other words, the plaintiff below, defendant in

error here, is entitled to the benefit, not only of all the facts which the evidence tended to establish, but also of every conclusion and inference which might fairly be drawn from the evidence produced; and unless as matter of law no recovery could be had upon any view which could properly be taken of the facts which the evidence tended to establish, and of the inferences from those facts, the verdict will not be disturbed.

Myers v. *Pgh. Coal Co.,* 233 U. S., 184, 193;
Davidson S. S. Co. v. *U. S.,* 205 U. S., 187, 190-1;
Hackfield & Co. v. *U. S.,* 197 Id., 442, 446-7;
James v. *Appell,* 192 U. S., 129, 136-7.

From these authorities it will be quite clear that it is not the object of the law lightly to subvert the findings of a jury in a negligence case; and while the court will protect parties against improper verdicts, still, it will not impair the right of trial by jury under the disguise of determining whether the verdict is against the weight of the evidence (*Phoenix M. L. I. Co.* v. *Doster,* 106 U. S., 30; *Klutt* v. *Philadelphia Ry.,* 145 Fed., 965, 148 Id., 818; *Davis* v. *Memphis City Ry.,* 22 Id., 883, 887; *Cascade Foundry Co.* v. *Muller Furnace,* 140 Id., 491). And so, likewise, in determining whether the plaintiff in a suit for damages for negligence was so clearly guilty of contributory negligence as to entitle the defendant to a verdict,

the court of review is bound to put upon the testimony the construction most favorable to the plaintiff, where the verdict was for him (*Chicago, etc. Ry.* v. *Lowell,* 151 U. S., 209).

4. **Where the trial court by refusing a motion for a new trial evidences its satisfaction with the verdict, an Appellate Court will be extremely loath to interfere with such verdict.**

It is, of course, the province of the trial judge in the federal courts, either before submitting a case to a jury, or after verdict upon motion for a new trial, to determine for himself whether the evidence produced by the plaintiff is sufficient to authorize a jury to draw the inference of negligence (*Myers* v. *Pittsburg Coal Co.,* 233 U. S., 184; *Commissioners* v. *Clark,* 94 Id., 278; *N. Y., etc. Ry* v. *Diffendaffer,* 125 Fed., 893): but in the cause at bar, that question was resolved in favor of the plaintiff below, as the presence of this cause in this Appellate Court clearly demonstrates. The state cases supporting the rule against interference with the verdict by the Appellate Court, when such verdict is based upon some evidence at least, and has been approved by the trial court, are innumerable; but we shall content ourselves with referring to the following as sufficient to indicate recognition of the rule by the Federal Courts also: *Atlantic Coast Line Ry.* v. *Linstedt,* 184 Fed., 36, 43. And that the rule just invoked is recognized in the State of California, may

be evidenced by the following brief quotation out of many that might readily be made:

> "The evidence was such as to legally support a conclusion that all these circumstances existed. Assuming the situation to have been as described, as we must do, in view of the verdict, we are clearly of the opinion that it may not be held, as matter of law, that the defendant was not guilty of negligence. And if this be so, the findings of the Jury, *and the conclusion of the learned trial Judge on motion for new trial,* so far as this question is concerned, are conclusive upon us."

Tousley v. *Pac. Elec. Ry.,* 166 Cal., 457, 461.

5. Summary on these points.

From an examination of the foregoing authorities, we submit it to be reasonably clear that a verdict of a jury in a negligence case, should be vacated only in the very clearest sort of a case. The independence of the jury in matters of fact has always been recognized by the courts: they are the constitutional triers of the facts; and their findings, especially in cases depending upon the inferences to be drawn by practical judgment, are not to be lightly set aside. It is, indeed, the highest effort of the law to obtain the judgment of twelve men of the average of the community as to whether negligence does or does not exist in a given case. Upon this writ of error, we submit that the defendant in error is entitled to the benefit, not only of all the facts which the evidence tended to establish, but also of every inference and conclusion which

may fairly be drawn from the evidence produced; and unless, as matter of law, no recovery could be had upon any view which could be properly taken of the facts which the evidence tended to establish, and of the fair inferences from those facts, this verdict should not be disturbed. In cases of doubt as to the proper inferences to be drawn, or where the facts are such that different minds might draw different inferences or conclusions from them, the jury are the supreme judges of the facts and of the inferences to be drawn therefrom; and in such cases, to set aside their verdict would be to usurp their proper province and to substitute the opinion of the court for that of those who are the constitutional triers of questions of fact. And that the inferences from the facts are to be drawn by the jury, and are not for the court, and that the ultimate fact of negligence is determinable by inference are settled propositions in the law. The general and unquestioned rule undoubtedly is that where a decision of fact was reached upon conflicting evidence, the courts will not interfere, and wherever there is any evidence from which an existence of facts sufficient to support the verdict might have been inferred, the verdict will not be disturbed. Nor is there anything in the recorded views of the federal courts antagonistic to this suggestion. On the contrary, as federal judicial history will attest, the federal courts have always stood firm for the proposition that a verdict reached upon conflicting evidence, or upon conflicting infer-

ences from the evidence, will not be disturbed; and so solidly has this principle become grounded in federal jurisprudence that the case must be an extremely rare, unusual and extraordinary one where it will be departed from (*Myers* v. *Pittsburg Coal Co.*, 233 U. S., 184). The present, we submit, is not such a case; and we respectfully contend that any person reading with an open mind the evidence introduced upon the second trial of this present action, will find the conclusion to be irresistible that the verdict of the jury was and is supported by the evidence both ample and convincing; and it is submitted that a careful examination, comparison and contrast of the authorities heretofore cited will justify the statements of the law which have just been made.

THE NATURE AND PROOF OF NEGLIGENCE.

There is nothing occult about the nature or proof of negligence: the issue of negligence is not to be treated otherwise than, or differently from, any other issue presented for determination: negligence is a conclusion drawn by practical judgment from the facts proved; and no mysterious restrictions surround or insulate the mode of its proof.

(a) The nature of negligence:

It may not be amiss to point out "negligence is the "failure to do what a reasonable and prudent person "would ordinarily have done under the circumstances "of the situation, or doing what such a person under "the existing circumstances would not have done. "The essence of the fault may lie in omission or com-

"mission. 'The duty is dictated and measured by the "exigencies of the situation'" (*B. & P. Ry.* v. *Jones,* 95 U. S., 439). Negligence, then, is the failure to exercise due care (*Kelly* v. *Malott,* 135 Fed., 74, 76; *Beyer* v. *Hamburg-American S. S. Co.,* 171 Id., 582, 583): it includes all those shades of inadvertence which range between deliberate intention, on the one hand, and total absence of responsible consciousness, on the other; and it may consist in pure passivity (*Basler* v. *Sacramento Gas Co.,* 158 Cal., 514, 519). But negligence is not absolute, it is wholly concrete; and it is always relative to the special facts and circumstances of the particular case (*Charnock* v. *T. & P. Ry.,* 194 U. S., 432, 437; *Sandy* v. *Swift & Co.,* 159 Fed., 271, 165 Id., 622; *Fox* v. *Oakland Ry.,* 118 Cal., 55, 61-2). Negligence need not be wilful (*Bayne* v. *Irwin,* 72 S. W. (Mo.), 522); and to allow one's attention to become distracted, is to be negligent (*Gaudet* v. *Stansfield,* 65 N. E. (Mass.), 850); and it may be added that although several acts of negligence may be alleged in a complaint, still, the plaintiff does not have to establish them all, and one only need be proved.

Smith v. *M. P. Ry.,* 56 Fed., 458, 460;
Cross v. *Evans,* 86 Fed., 1, 6;
Balakala Cons. Copper Co. v. *Whitsett,* 221 Fed., 421;
The Sargent Co. v. *Shukair,* 138 Ill. App., 380; 85 N. E., 621;

Dutro v. *Metr. St. Ry.*, 86 S. W. (Mo.), 915;
L. & M. Ry. v. *Mothershed,* 97 Ala., 261;
Columbus v. *Anglin,* 120 Geo., 785;
Greer v. *Ry.,* 21 S. W. (Ky.), 649;
Hagerman v. *Chapman Timber Co.,* 133 Pac. (Ore.), 342.

And the rules defining the nature and extent of the employer's duty to provide for the safety of his employees, are thus summarized by Circuit Judge Morrow, speaking for the Circuit Court of Appeals for this circuit:

"In general terms, the degree of care required "of an employer in protecting his employes from "injury is the adoption of all reasonable means "and precautions to provide for the safety of his "employes while they are engaged in his employ- "ment, and this degree of care is to be measured "by the dangers to be apprehended or avoided.

"The employer, whether a natural person or a "corporate body, is under obligation not to expose "the employe in conducting the employer's busi- "ness to perils or hazards against which he may "be guarded by proper diligence on the part of "the employer.

"The care required of the employer is that of "reasonable diligence; 'and reasonable diligence "implies, as between the employer and the em- "ployé, such watchfulness, caution and foresight "as, under all the circumstances of the particular "service, a corporation controlled by careful and "prudent officers ought to exercise.'

"The failure of the employer to exercise such "reasonable diligence, caution, and foresight as a

"prudent man would exercise under the circum-
"stances is negligence. . . .

"It was the duty of the defendant to use reason-
"able diligence in furnishing a safe place for its
"employe to work in, and whatever risk the em-
"ploye assumed in carrying on the defendant's
"business did not exempt the defendant from that
"duty."

Sandidge v. *Atchison etc. Ry.*, 193 Fed., 867, 872.

And so, likewise, the same court, speaking through Circuit Judge Gilbert, observes:

"It was the duty of the plaintiff in error to fur-
"nish the defendant in error a safe place in which
"to work, and to keep it reasonably safe during the
"progress of the work. That duty was not con-
"fined to the spot in which the defendant in error
"regularly or principally worked. It extended to
"places where he had to go in the course of his
"work, and that duty could not be delegated to
"another so as to relieve the plaintiff in error of
"liability for failure to perform it. The defend-
"ant in error had the right to look to his employer
"for the discharge of that duty, and if the latter,
"instead of discharging it himself, saw fit to dele-
"gate it to another servant, he did not thereby
"alter the measure of his own obligation. . . .

"Nor did the defendant in error assume the
"risks resulting from a breach of duty of the
"plaintiff in error to furnish him a safe place in
"which to work, whether that duty was assumed
"by the master, or was by him delegated to an-
"other."

N. P. Ry. Co. v. *Schoeffler*, 193 Fed., 627, 629-630.

No master or employer has any right to speculate either with his appliances or with the lives of those who use his appliances: "the law does not permit an "employer to take any chances as to the safety of his "employees" (*Broom* v. *Construction Co.,* 159 Cal., 89, 94): and "if such speculation were as matter of law sufficient to repel the affirmable inference of negligence, responsibility might be quite easily avoided."

(*Miller* v. *O. S. S. Co.,* 118 N. Y., 199, 209.)

And see further upon this topic:

Hough v. *T. & P. Ry.,* 100 U. S., 213;
U. P. Ry. v. *Forb,* 84 Id. (17 Wall), 553;
Wabash Ry. v. *McDaniels,* 107 Id., 454;
N. P. Ry. v. *Herbert,* 116 Id., 642;
Washington etc. Ry. v. *McDade,* 135 Id., 554;
Mather v. *Rillston,* 156 Id., 391;
S. P. Co. v. *Lafferty,* 57 Fed., 540;
N. W. Fuel Co. v. *Danielson,* Id., 915;
Rocky Mt. Co. v. *Bassett,* 178 Id., 768.

(b) **The Proof of Negligence.**

The proof may be either direct or inferential: the ultimate fact of negligence may be inferred by the jury from all the facts and circumstances exhibited by the testimony before them; and not only is circumstantial evidence of negligence enough to sustain a verdict, but it need not exclude all other possible

hypotheses: indeed, in drawing its inference of negligence, the jury may consider the general conditions and surroundings, particularly where there is an absence of evidence of fault on the part of the person killed, and where the conditions and surroundings are such as reasonably to admit of the inference of lack of due care.

Waters-Pierce Oil Co. v. *Deselms,* 89 Pac. (Oklahoma), 212, 216-17: Affirmed, 212 U. S., 159, 176-7;
Choctaw etc. Ry. v. *McDade,* 191 U. S., 64;
Massner v. *Atchison Ry.,* 177 Fed., 618;
W. U. Tel. Co. v. *Catlett,* Id., 71;
T. & P. Ry. v. *Coutourie,* 135 Id., 465;
Wabash Screen Door Co. v. *Black,* 126 Id., 721;
Jones v. *Penn. Ry.,* 114 Id., 984;
Portland Mining Co. v. *Flaherty,* 111 Id., 312, 314;
Boucher v. *Larochelle,* 15 L. R. A., N. S., 416;
Jones v. *Leonardt,* 10 Cal. App., 284.

Neither direct evidence, nor a demonstration, of negligence is necessary: if the probable cause of the injury be the negligence of the defendant, the verdict should be sustained; and if no other cause than the defendant's negligence is fairly adequate to explain the occurrence, the jury may so infer.

Waters-Pierce Oil Co. v. *Deselms, supra;*
T. & P. Ry. v. *Carlin,* 189 U. S., 354;

Home Insurance Co. v. *Weide,* 78 Id. (11 Wall), 438;
V. & S. W. Ry. v. *Hawk,* 160 Fed., 352;
Cecil v. *American S. S. Co.,* 129 Id., 542;
Toledo Brewing Co. v. *Bosch,* 101 Id., 530;
Western, etc. Ry. v. *Shivers,* 61 Atl. (Md.), 618;
Moody v. *Peirano,* 4 Cal. Appeals, 411, 420.

The precise defect by which, or the exact way in which, the injury or death occurred, need not be proved:

Champagne v. *A. Hamburger & Sons,* 169 Cal., 683, 689.

The suggestion of possible theories by the defendant intended to be exculpatory of the charge of negligence, does not turn the case into one of guess or speculation: a theoretical possibility, unsupported by any reasonable probability based upon the evidence in the cause, that the injury was caused by some means other than the negligence of the master, will not outweigh proof which carries conviction to the ordinary mind that the negligence of the master caused the injury:

Choctaw etc. Ry. v. *McDade,* 191 U. S., 64;
Wabash Screen Door Co. v. *Black,* 126 Fed., 721;
Boucher v. *Larochelle,* 15 L. R. A., N. S., 416;

Burns v. *Ruddock etc. Co.*, 38 Sou. (La.), 157;
Wolfarth v. *Sternberg*, 56 Atl. (N. J.), 173;
Angel v. *Jelly Coal Co.*, 74 S. W. (Ky.), 714.

The language of the New Hampshire court in *Boucher* v. *Larochelle, supra,* is so pertinent, that we cannot refrain from quoting the following brief passage therefrom:

"The claim is that the death of the child may "have been due to its condition, or may have been "the direct result of the fracture, and that there- "fore the plaintiff failed to prove that the defend- "ant's negligence was the cause of death. Using "the word 'proof' in the sense of demonstration "to an absolute certainty, the defendant's conten- "tion could probably be sustained. Questions "capable of exact demonstration are rarely the "subject of litigation. No such burden rested on "the plaintiff. *He was not bound to exclude all "possible causes of death.* He was required only "to make it more probable than otherwise that the "fact was as he claimed it. The rule of *Deschenes* "v. *Concord & M. R. Co.*, 69 N. H., 285, 46 Atl., "467, that the jury cannot be permitted to deter- "mine by guess or conjecture between two equally "probable causes of the injury, for one only of "which the defendant is responsible, *has no appli- "cation unless the existence of a sufficient cause or "causes for the injury, aside from the negligence "charged, is conceded or conclusively proved.*"

REVIEW OF FACTS.

There was evidence before the jury from which they could properly have drawn the inference and have reached the conclusion that the death of the deceased was due to the negligence of the defendant.

We believe that a general review of the facts established in this cause will be of assistance to the court, for more than one reason. We venture to believe such a review to be proper in order to explain and illustrate the theory of the plaintiff in the action, and, again, to assist the Court in appreciating the rulings of the Court below made during the progress of the trial, and, moreover, to point the sufficiency and correctness of the charge of the Court to the jury. And we think that a case of this kind should be considered as a connected and consecutive history; that no scattered or broken view should be taken of that history; and that all of the circumstances should be considered together, one fact explaining or illuminating another. We venture to believe that this suggestion is particularly true in negligence cases: because negligence is something concrete, and purely relative to the facts and circumstances of the particular case; and it is an inference which the good judgment of the jury draws from all those facts and circumstances. And in presenting this review of the facts, we shall confine our attention principally to the showing made on behalf of the plaintiff below, defendant in error here, adverting to the testimony from the defendant below,

plaintiff in error here, only whenever illustrative of that presented by the plaintiff below. We do this the more readily because, as we have already pointed out, to repeat the language of Mr. Justice Day, the testimony "must be considered in determining questions of "this character in Appellate Courts in its most fa- "vorable aspect to the plaintiff below" (*Myers* v. *Pittsburg Coal Co.,* 233 U. S., 184, 193). In other words, after a favorable verdict in the Court below, after the denial by the trial judge of a motion for a new trial, and in this Appellate Court, the defendant in error is, so to speak, much in the position of a plaintiff upon a motion for a nonsuit: that is to say, the court will assume as true every fact which the evidence, and which the inferences fairly deducible therefrom, tend to prove, and which are essential to entitle the plaintiff to recover: evidence must be taken most strongly against the defendant: contradictory evidence must be disregarded; and such a motion will be denied if there is any evidence tending to prove the plaintiff's case, without passing on the sufficiency of such evidence.

It will be observed from the Record that the complaint in this action charges more than one act of negligence: but, as we have already pointed out, it is not the law that there can be no recovery by the plaintiff unless each and every act charged is independently and specifically proved. It frequently happens that a given situation, in which an injury or death occurred,

presents several different aspects or acts of negligence, and in such cases it is a part of a prudent counsel's plain duty to charge all such acts of negligence. It often happens, also, in such cases, that, sometimes for one reason, sometimes for another, all of the acts of negligence charged are not proved, but only some one or more of them; and the law takes notice of this familiar situation, and, as the authorities already cited will demonstrate, makes it clear that where several acts of negligence are pleaded, it is not necessary that the plaintiff should prove them all, and that it is enough if the injury or death resulted from some one of them.

The case made for the plaintiff below exhibited certain undisputed facts: thus, there was no doubt that the deceased was killed: there was no doubt that he was killed on July 1st, 1912: there was no doubt that he was killed on the defendant's premises; nor was there any doubt that he was killed from the defendant's runaway harvester. Nor was any contest made in the court below as to the marriage of the deceased, or as to the existence of his child, or as to the age or expectancy of life of the deceased, and of his widow, nor as to the earning capacity of the deceased, nor as to the dependence of the widow and her child upon the earnings of the deceased for the support and maintenance of herself and her child.

As to the actual tragedy itself, the plaintiff below presented the testimony of three witnesses, Albano,

Knight, and Salapi. Albano "was on the harvester "on July 1, 1912, when Peter Spino was killed" (35): Albano "was sack tender and was on the left side" (36) of the harvester. It appears from his testimony that a man named Trainor was working with Albano, and so likewise were Salapi and Knight: "Mr. Knight "was the boss of the machine" (35). Albano tells us that "Pietro Spina was driving the mule team at- "tached to the harvester, consisting of 32 mules" (35). It appears from Albano's testimony that both during the months of June and July, 1912, "I was employed "at Midway Camp by Miller & Lux" (35), still "I do not know Twining" (35-6); and no sufficient reason appears why, if Twining were a frequent visitor to that harvester, Albano should not know him. It will appear from other portions of the testimony that Twining was a stranger to the harvester, and to the mule team attached to it, which the deceased was driving, and it will appear that Twining never made more than two visits to this harvester, one on an occasion prior to the tragedy, and the other at the time of the tragedy; and in view of this unfamiliarity of Twining with the harvester and its mule team, Albano's statement that although he had been employed during the month of June, 1912, at Midway Camp, still, he did not know Twining, is significant as a circumstance in support of the combined testimony of Knight and Salapi, as to the rarity of Twining's visits to the harvester. Albano tells us that "just before

" Peter Spino was killed I see a boy with a horse and " cart" (36). When Albano first saw this boy with the horse and cart, the boy was pretty close to the machine, was on the left side of the harvester, was going in the same direction as the harvester, was runing pretty fast, and the boy was holding the horse pretty strong (36). Albano then tells us that the next thing happened, this man died: "He fell down on the " ground and he died" (36). Albano states that " when the little cart was passing by the mules, it " scared them and they turned around and the man " fell down on the ground from the seat. He was " on the driving seat of the harvester. When the " mules got scared in that way they started to run " away" (36). He then describes the flight and ultimate stoppage of the frightened mule team and then states that "When they stopped I went back to the " dead body of Pietro Spina" (36). It appeared from the direct examination of Albano, that the business of the boy in the cart was to count the sacks; and he repeats this on cross-examination, and adds that "Mr. "Trainor got off the harvester and went out to the cart " to give him the number of sacks. Mr. Trainor was " not at the cart when the horse that was on the cart " began to run away. He was on the ground quite " a ways off from the cart" (37); but "The boy was " in the cart all the time" (Id.). Albano then adds the following statement on cross-examination: "I did " not notice when the horse and cart first began to run,

" —not when they started. After the horse started to " run, the mule team started to run away also" (37). On cross-examination, he repeats that "Spino fell down" and a sentence or two later states that "Spino went off." And he concludes his testimony with some remarks about the entanglement of one of the driving lines on Spino's foot.

It is thus plain from Albano's testimony that "when " the little cart was passing by the mules it scared " them" (36); and "when the mules got scared in " that way, they started to run away" (Id.); and on cross-examination he emphasizes this thought by stating, "I did not notice when the horse and cart first " began to run,—not when they started. After the " horse started to run the mule team started to run " away also" (37). In other words, this boy who " was in the cart all the time" (37), "came up to get " the number of sacks" (37): Trainor got off the harvester and went out to the cart to give the boy the number of sacks, but was not at the cart when the horse began to run away—"He was on the ground " quite a ways off from the cart" (37). It was evidently at this time that the horse started to run, and the horse was running pretty fast (36), and the boy was holding the horse pretty strong (36). The horse and cart was "on the left side of the harvester, going " the same direction as the harvester," and "pretty " close to the machine" (36). In other words, when the horse started to run, it was pretty close to the machine and was "going the same direction as the

"harvester": that is to say, was approaching the mule team from behind; and "when the little cart was pass-
" ing by the mules, it scared them," and "when the "mules got scared in that way they started to run
" away" (36). It was during this flight of this frightened mule team of 32 mules that the deceased "fell down"—"went off," and was killed. To sum up, then, this testimony of Albano, it is perfectly clear that the running of the horse preceded the running of the mule team, and that the running of the horse frightened the mule team, and caused it to run away also, thus precipitating the death of the deceased. It is, therefore, a very pertinent inquiry, as to how it came about that the horse ran at all and thus originated the series of events which terminated in the death of the deceased? Why should the horse have run? Assuming the horse to have been of a quiet and gentle disposition, and assuming this boy to have been a proper and experienced person to place in charge of the animal, assuming a reasonable degree of familiarity on the part of the boy with the horse and with the dangers incident to an easily frightened mule team, how did it come about that this horse ran at all? If the boy were competent, if the horse were gentle, if the boy were alive to the dangers associated with an easily frightened mule team, and if the boy took proper precautions to control and restrain the horse which had been committed to his use by the defendant, it is extremely difficult to understand how or why that horse should have run at all. Plainly,

there was some inattention, some inadvertence, some lack of care, some negligent management, on the part of this boy in the management, control and restraint of his horse, which gave that horse the opportunity to get his head and run.

The thoughts just suggested are reinforced by the testimony of Mr. Knight. Like Albano, Knight was also an employee of the defendant: but unlike Albano, "Mr. Knight was the boss of the machine" (35); he was "running the harvester" (38); "I was "foreman" (39). And he was an experienced person in his line of activity: "I have been engaged in farm- "ing operations for about 20 years or more. During "that time have been employed principally by Miller "& Lux, and am in the employ of Miller & Lux "now, and was in June and July, 1912, at Los Banos, "in Merced County, running the harvester" (37-8). In other words, Knight was a practical farmer who had been for many years in the employ of the defendant; and his long employment in the service of the defendant amounts to a certificate by the defendant to his competency and good character,—otherwise, the defendant never would have retained him in its employ. Moreover, he was the foreman of the harvester; and the appointment of Knight by the defendant to this position of authority exhibits the defendant's increased confidence in him. Albano and Salapi may be criticised here because they are Italians, and possibly disposed in favor of the plaintiff: but that sort of criticism has no place here, where the

testimony "must be considered in determining ques-
" tions of this character in Appellate Courts in its
" most favorable aspect to the plaintiff below" (*Myers* v. *Pittsburg Coal Co.,* 233 U. S., 184, 193). And apart from that, not only would these two witnesses have a strong motive to favor their employer, but " any attempt to attribute a rooted lack of veracity to " any one branch of the human family is based on a " self-conceited assumption or a narrow experience" (2 *Wigmore Evid.,* Sec. 936, citing *U. S.* v. *Lee Huen,* 118 Fed., 442, 463; where the learned Judge pointed out that "no discredit can legally attach to " the testimony of a person because he gives his evi-
" dence in favor of a party belonging to his own na-
" tionality"). And aside from this, not a syllable appears in this record in the way of impeachment of either of these two witnesses. Neither of them is shown to be in any way interested in the outcome of this case: there is not a single fact to justify the inference that either of them has anything to gain by distorting the facts of this case in favor of the plaintiff: the record shows them to have been decent, hard-working, orderly men, honestly earning their living and telling what they saw in a simple and direct way; and as we shall see hereafter, the stories which they tell are fully corroborated in many material matters by the very witnesses produced by the defendant below. But no criticism of any such character can attach to Knight: for he was not only a responsible em-

ployee of the defendant, retained for many years in its service, but he is not open to any charge of race bias,—he was not an Italian. In addition to all this, it will appear that Mr. Knight was familiar with all of the facts of this unfortunate history from its commencement to its close. This experienced employee of the defendant commences his testimony by explaining that in the course of his experience in farming, he had experience with horses and mules for thirty or thirty-five years, driving them, breaking them, and all kinds of experience, and was acquainted with the habits and manners of such animals. He tells us that a mule team is easily frightened and frequently runs away, and that the general characteristics of mule teams are known to persons engaged in farming operations. He says that the regular, usual noise made by a harvester when in operation will not frighten the mule team, but that any sudden noise to which they are not accustomed will frighten them. He tells us that "if "a mule team is approached from behind by another "animal, that will have a tendency to frighten the "mule team. If the animal that approaches the mule "team from behind is going at a high rate of speed, "going rapidly, that will frighten the mule team. "A mule team will be frightened by one who drives "up to it in a heedless way" (38). And Mr. Knight explains that his experience covers not only mules, but also horses, which animals he has driven, and broken, and used in various ways.

Mr. Knight recollects the boy named Twining, met him two or three times, but was not well acquainted with him: "I have seen this boy out in the field, "where this harvester was working at Midway Camp, "a couple of times. I think he was about eighteen "or twenty years of age" (38, 39). He then adds that, including himself, five men were employed on the harvester: "I was foreman, Peter Spina was "driver, Albano was sack tender, and Trainor was "sack sewer" (39). The position of the sack sewer was on the left hand side of the harvester, about two feet from the ground (39). Mr. Knight tells us that Salapi had been working about a month prior to the time when Spina was killed. He then explains Spina's situation on the harvester, telling us that he was the driver and faced the mules with his back towards the machine; and he adds that Spino had worked on that harvester about a month before the day of his death, and earned in that capacity $3.00 a day and his board, working 26 days a month (39).

Mr. Knight then goes on to describe facts which establish, not only Knight's knowledge of the liability of the mules to run away, but also the knowledge of the same fact by Twining. Knight tells us that on June 27, 1912, three days before Spina died, Twining came out to the machine driving a brown horse. Twining got out of the cart and got in where the sack sewer was: Knight was on top of the machine and looked up and saw Twining's horse going

around the team, and the "mules started to run and "I grabbed the brake and stopped them" (40). He tells us that when Twining left his cart on that occasion, he let his cart go, that the horse went up alongside the mules, and that they started to run, when Knight got to the brake and stopped them. When Knight stopped the team, he got up on the machine where Twining could see him and said to Twining, "You take care of that horse or stay out of the field; "that he might cause a runaway, and kill some- "body, or some of the mules tear up the machine" (40); and when Knight said that to Twining, he did not hear Twining make any reply, but Twining got into his cart and drove off. It is, we respectfully suggest, to be borne in mind that the parties to this occurrence were Knight, who "was in charge of the "harvester as Foreman," and Twining, who in the undenied language of paragraph IV of the Amended Complaint, was then "actually engaged in his said "employment," viz., "to follow and attend said har- "vester and count and record the sacks as they came "from said harvester" (21). In other words, this incident discloses and brings home to the defendant, through its representatives, Knight and Twining, knowledge of the dangers associated with this easily frightened mule team; and exhibits that knowledge as possessed by the defendant, through its representatives, prior to the date when the unfortunate death of Spina took place.

Three days later, Spina was killed, about half past nine o'clock in the morning. On that occasion, Knight saw the boy Twining approach the harvester. When Knight first saw him he was probably a quarter of a mile away, coming from the south, while the harvester was going west. Instead of the boy approaching in a careful manner the harvester and its team of 32 easily frightened mules, we find that he did so in a manner inconsistent with the exercise of care and caution: for Knight tells us: "The boy "Twining was approaching the harvester from the "south on that occasion, between a gallop and a run. "As he came up from the south and came on toward "the harvester, he was twisting around some, and "when he got up closer to the harvester, he whirled "around a couple of times and then drove up in front "of the machine where the sack sewer was" (41). And in further description of the extraordinary manner in which this boy approached this harvester on this occasion, Knight further tells us that "He was "running through the field, and I seen him running "over the checks, and I could tell he was coming "pretty fast. He did not pursue a straight line. He "was turning coming around, kind of twisting zig-"zag" (41). And on cross-examination, in further description of this same approach of this boy to the harvester, Knight said: "He came in on a sort of "angle, made a couple of circles, close to the back of "the machine and went in alongside" (45-6). And

on page 47, still while under cross-examination, Knight makes the significant statement, "I saw Twin-"ing after he *quieted his horse down.*"

Knight then describes the horse which Twining was driving on July 1, and states that it was a different horse from the one he was driving on June 27th. Being asked for his opinion as to this horse which Twining was using on the morning of the death of Spina, Knight stated that "It was a high-lifed, small "horse, one that needs attention. In my opinion, it "was a spirited animal" (41). In describing the cart, he tells us that it was a medium cart without any brakes, that it had two wheels but no dashboard, and that there was no one else in the cart except Twining. When Knight saw Twining approach in the way that he has described, Knight went to the brake on the harvester. The mule team was all right and was going at a slow walk; and when Twining's horse and cart got alongside of the harvester, the harvester was going west, Twining's horse was walking, the mule team was walking, and the distance between the harvester and the cart was probably 20 feet (42). Under these circumstances, Knight thought that everything was all right, and, seeing a check ahead, went down to the brake: but when he went to the brake at that time, he could not see either Twining or Trainor, because his view was obstructed by the cleaner (42).

Knight then states some further interesting facts

bearing upon the existing situation. It appears that the harvester got in motion about seven o'clock in the morning, and Spina's death happened about half past nine: but between seven and nine o'clock, the harvester crossed several checks, and on those occasions there was no runaway. It appears that a check is a slight elevation in the ground to hold the water: it is probably two feet high, or a foot and a half, some being higher and some lower, depending on the formation of the ground; and they slope up and down, a gentle slope. When the harvester was nearing the check that Knight had seen, and while Knight was at the brake, the mules started to run; and at that time, Knight saw Twining, who was running right alongside of the mules with his horse going pretty fast (42-3). Knight then excludes certain causes, to which the running of these mules might argumentatively be attributed; that is to say, he tells us, that "so far as my observation of the facts occur-
" ring there on that occasion permits, the harvester
" did not start Twining's horse to run, nor did the
" mules themselves, so far as my observation went,
" start Twining's horse to run. I did not see any
" member of the harvester do any act to start Twin-
" ing's horse or the mules" (43). After Knight lost sight of Twining and had gone behind the cleaner, the next time he saw him the horse was alongside the mules, going pretty fast, fourteen or sixteen feet away from the mule team, and running west. The mules

were running west also, and ran probably one hundred yards, when they turned sharp to the right, ran down through the grain field, probably a couple of hundred yards, to a ditch of water, and turned to the left, where Knight stopped them (43). Just before this sharp turn to the right, Knight saw Spina on the seat, but did not see him after the sharp turn to the right; and after that he next saw Spina lying on the ground dead. Twining got his horse turned about the time the mules turned: he turned to the left, about the same time that the mule team turned to the right; and after turning to the left he went about a quarter of a mile back the same way he came,—south—where he stopped, looking back,—which was the last Knight saw of him, except that Knight saw him going through the field: Twining did not return to the scene (43-4).

On cross-examination, Mr. Knight stated that it was part of his duty as foreman of the crew to take charge all over the machine and watch everything, among other things one of the brakes. He describes Twining's business there and tells us that before the day of Spina's death, he can remember of Twining having been out there only twice: "I remember his "being there once before the runaway" (44). He then goes on to describe the occurrences of June 27th, when Twining first came up, and adds that " He was " not taking care of his horse at that time" (45). He states that it is not unusual for a buggy or cart to

drive up along the harvester while it is in operation, from behind; but adds the significant statement that "They keep out of sight of the mules" (45). Mr. Knight then goes over the occurrences of the second occasion when he saw Twining at the harvester, describes Spina's earnings, describes the checks, and describes the cart. He tells us that there was a part of the time on this second occasion when he could not see Mr. Twining on the cart, "In fact, that was "the condition of things when his horse started to "run" (47). He says that Twining's horse had run about midway of the team when he, Knight, first saw it, when the team was running, and that "his horse "ran about 200 yards before he got control of it" (47). He states, "I don't know whether he (Spina) "fell or jumped off, or how he got off" (48). He also adds, "I did not see Mr. Twining or his horse "at the time that it started to run, and I don't know "what it was started Mr. Twining's horse to run. "His horse started the team to run" (48). And in re-direct examination he tells us that "The header-"tender can see all around the field" (48).

Then came the testimony of Salapi, the header-tender, whose position was on the high part of the harvester, from which, if he chose to look around, he could see in the neighborhood (48). Like Knight, this witness also has had experience in handling mules and horses, having handled them in Italy for about five years, in Brazil about fourteen years, and in Cali-

fornia for five years. He tells us that although, during that morning the harvester passed over these checks, yet there was no runaway by the mule team (49). Shortly before Spina was killed Salapi saw a boy come near the harvester in a small cart, which had no brakes and which had two wheels; and when he first saw the boy on that occasion in that cart, he was about a quarter of a mile away back of the harvester: "He was running, zig-zagging before he gets "there. When he got fairly close up to the harvester "he turned his cart about twice around. He then "got near the harvester" (49). He says that when the boy got near the harvester he was about five or six steps away from it, and his horse was then going slowly, walking. Salapi was then asked concerning the sort of animal in his opinion that this horse was, and he stated that "The horse in my opinion was full "of life" (50). He then proceeds to describe the occurrence in question in the following language:

> "The mules were walking also; both the mules
> "and the horse and cart were walking straight in
> "the same direction. At that time while those
> "things were so, I saw Mr. Trainor; he jumps off
> "the harvester. He moves about two steps near
> "the cart. I see the boy in the cart at that time.
> "He was looking to Billy Trainor. I saw that he
> "was talking. I could not hear the words that
> "they said, because the harvester was making a
> "noise. The lines from the boy's horse were lying
> "on top, loose, on top of the single-trees. He had
> "the ends of the lines, the extreme ends, the tips,
> "in his left hand. He was making motions to

" Billy Trainor with his right hand. His left hand
" that held the tips of the lines was laying on his
" left knee at the time he was making these mo-
" tions to Trainor. While that was so the horse ran
" at once directly to the team. When the horse
" reached the mules and got alongside of the mules
" the mules ran away, right straight ahead. The
" horse runs alongside the team about seventy feet
" and then turns to the left. The mule team ran
" on the right side as far as the ditch. They were
" stopped there. When the boy's horse started to
" run I saw him get hold of the line with both
" hands and try to hold the horse. When the mules
" were running I left the header."

He was then asked what became of Spina, and tells us that "He was thrown off at the time the mule team " was turned on the right" (51). He then goes on to describe his efforts to get hold of the lines and states that when the mule team was stopped "I went " back to the place where Spina was thrown off. See " him there. He was dead" (51). He then concludes his direct examination by stating that "From " my experience with mules, when mules are ap- " proached from behind, from the rear, by another " animal running, that would frighten the mule team. " I had been working on the harvester twenty-two " days before Spina was killed; during those twenty- " two days, I saw Twining out there in the field near " the harvester twice" (51).

The cross-examination of this witness consisted principally in reading in evidence as part of his cross-

examination, his testimony as given upon the first trial of this case.

The record here exhibits the fullest corroboration of the testimony of Salapi. In many material particulars, he is corroborated by Knight, the defendant's foreman: but he is equally thoroughly corroborated by Twining. It is true that as to the talk with Trainor and as to the slack reins Twining endeavors to exculpate himself: but the endeavor was not successful; and, after making due allowances for the position and testimony of one who is himself accused of negligence resulting in the death of a human being, Twining was constrained to tell substantially the same story as Salapi. In a word, if Twining told the truth, then Salapi did; and the jury, as they had a perfect right to do, adopted Salapi's testimony, and discredited and rejected that of Twining.

Illustrations of the corroboration of Salapi by Twining are numerons, as will be perceived by an attentive reader of the Record; and we shall therefore limit ourselves to but a few.

(a). At page 50 of the Record, speaking of the time when the horse was alongside the harvester, Salapi tells us that "the mules were walking also: "both the mules and the horse and cart were walking "straight in the same direction."

Twining describes the same situation at page 105 in the following language: "When I was alongside the "harvester, my horse was walking and the mule team

" was walking, too'; and on page 108, admits that he told O'Malley that his horse was facing the same way as the mules, "going the same way."

(b). At page 50, Salapi tells us, continuing his testimony, that "at that time while those things were " so, I saw Mr. Trainor; he jumps off the harvester. " He moves about two steps near the cart."

On page 101, Twining tells us that "the sack-sewer " got out and *started* to give me the count"; and on p. 105, states, "at that time, I was looking toward " the machine and the sack-sewer was getting out of " the harvester on the side I was on. He *started* " to go towards me."

(c). At p. 50, speaking of Trainor, the sack-sewer, Salapi tells us that "He moves *about two steps* near " the cart."

Upon this point, at p. 37, Albano tells us that " Mr. Trainor got off the harvester and went out to " the cart to give him (the boy Twining) the number " of sacks. Mr. Trainor was not at the cart when " the horse that was on the cart began to run away. " He was on the ground quite a ways off from the " cart." And Salapi is further corroborated by Twining himself who, at p. 105, tells us that the sack-sewer "*started* to go toward me"; and at p. 102 states that "he had not got up to my cart yet."

(d). At p. 50, Salapi tells us that "the lines from " the boy's horse were lying on top, loose, on top of

" the singletrees. He had the ends of the lines, the " extreme ends, the tips, in his left hand."

But where, from the beginning to the end of his testimony, and although his attention was specifically directed to this subject-matter with painful particularity, has Twining attempted to deny this statement? A very careful examination of Twining's testimony discloses, not only no denial of this crucial fact, but also declarations and statements that indirectly admit it—that cannot be rationally interpreted except upon the theory that the lines were loose. At p. 102, he told the Court that he did not remember how he was holding the lines when the horse was walking alongside the harvester and he had the lines in one hand: but if it be true, and he states it to be the fact, that he does not remember this, then his lack of memory upon this point deprives him of all capacity to contradict Salapi—for how could he undertake to question Salapi's statement of this fact when, as he admits, he has himself no memory or recollection of that fact?

At the top of p. 103, Twining tells us, speaking of the lines, that "I know that I had them tight enough " to keep the horse under control": but surely, this was the least he could say for himself; and if the statement were true, why did he not "keep the horse "under control"? We all know that the horse escaped from control, ran and frightened the mule team into running, and thus caused the death of the deceased: but these facts cannot be reconciled with the bald

assertion that "I know that I had them tight enough "to keep the horse under control." And Twining admits this at the bottom of p. 104, where he states, corroborating Albano and Salapi, that "From the "time the horse started to run *until I finally got it* "*under control,* I did everything in my power to con- "control the horse": if this be not an admission of the escape of the horse from control, and as much of an admission of that fact as anyone could reasonably expect from Twining, then we must confess that the English language has lost much of its significance. But could anything be more suggestive and significant, in this connection, than Twining's statement on p. 103, that "When the horse started to run, I grabbed "the lines with both hands and tried to hold them"? We beg of the Court to observe that it was "when "the horse started to run," that Twining "grabbed "the lines"; and we think it a very pertinent inquiry as to what was the position of those lines just before "the horse started to run," and where were those lines when Twining "grabbed" them? Twining states that "when the horse started to run, I grabbed the lines": but if the lines were not loose, and if it was true that "I know that I had them tight enough to keep the "horse under control" (103), where was the occasion or necessity to "grab the lines"? If the phrase "I "grabbed the lines" have any intelligent meaning, it must mean that Twining made a sudden grasp or seizure of the lines: if the word "grab" means any-

thing at all, it must mean that, and it was not used otherwise: could there then be than this a plainer admission that, just before "the horse started to run," Twining, not only did not have the lines "tight enough " to keep the horse under control," but also did not have the lines tight at all?

(e). Salapi tells us, at p. 50, that Twining "had " the ends of the lines, the extreme ends, the tips, in " his left hand."

But Twining nowhere denies that he had the lines in his left hand, and the only difference between him and Salapi upon this point is that Twining claims that he was sitting on the lines and "they hung down " the back about two feet" (103). But Twining distinctly admits that Salapi was correct about the hand that the lines were in, for he says, "I drove up to " the side of the harvester, and I had the lines in my " hand, *and I believe that I changed them to my left* " *hand,* and held them with my one hand, and turned " in my seat towards the harvester"; and he repeats this on p. 102, where he states that "when my horse " started to run I had my lines in my left hand and " was looking *back* towards the machine"; and also on p. 105, where he says, "The reins were in my left " hand, I changed them to my left hand."

(f). At p. 50, Salapi tells us that Twining "was " making motions to Billy Trainor with his right " hand."

But where has Twining undertaken to deny this?

Salapi tells us that Twining was talking to Trainor, but that he, Salapi, could not hear the words they said because of the noise of the harvester; and Twining does not remember whether there was any talk or not (109, 110): nor does Twining remember any of the surrounding circumstances except that Trainor got off the harvester and at that moment the horse started:

> "Q. Counsel asked you if, when you were
> " driving alongside of the harvester on that morn-
> " ing, and Mr. Trainor or whoever it was was get-
> " ting off the harvester to come towards you, if you
> " didn't say to him that your horse had run away
> " twice that morning, and, as I understood you
> " you stated that you didn't remember stating that.
> " A. Yes, sir.
> "Q. Well, did you state it?
> "Mr. Dunne—He says he does not remember.
> "The Witness—I don't remember. The only
> " thing that I remember is that he got off and at
> " that moment my horse started" (Record, p. 112).

But if these things be so, how could Twining undertake to dispute Salapi's statement as to the motions being made to Trainor with the right hand—the natural gesticulation so frequently incident to conversation? And the fact is that he did not dispute Salapi's statement, and that statement stands in this record wholly uncontradicted.

(g). At page 50, Salapi tells us, in speaking of Twining, that "his left hand that held the tips of the " lines was laying on his left knee at the time he was " making these motions to Trainor." But this is

merely another statement nowhere denied by Twining. Twining knew perfectly well whether his left hand was or was not on his left knee: he knew this as well as he knew that the lines were in his left hand: he knew this as well as he knew that when his horse started to run, he had the lines in his left hand "and " was looking *back* towards the machine" (102): but if his left hand were not upon his left knee, as Salapi relates, why did he not say so in plain terms?

(h). At p. 50, Salapi, speaking of Twining, tells us that "he was looking to Billy Trainor. I saw that " he was talking. I could not hear the words that " they said, because the harvester was making a noise. " The lines from the boy's horse were lying on top, " loose, on top of the single-trees. He had the ends " of the lines, the extreme ends, the tips, in his left " hand. He was making motions to Billy Trainor " with his right hand. His left hand that held the " tips of the lines was laying on his left knee at the " time he was making these motions to Trainor. " While that was so the horse ran at once directly to " the team."

Does Twining dispute this fact,—a fact by force of which his attention was diverted from the high-lifed and spirited animal that needed attention and that was in front of him, to the approaching Trainor who was upon his right side, and from whom he expected to receive the count of the sacks? At page 105, he tells us that "When I was alongside the harvester my

" horse was walking and the mule team was walking, " too. The reins were in my left hand. I changed " them to my left hand. At that time I was looking " toward the machine and the sack-sewer was getting " out of the harvester on the side I was on. He " started to go toward me. I was looking toward the " harvester. It was then that the horse ran." And at page 101, he says, "I drove up to the side of the " harvester, and I had the lines in my hand, and I " believe that I changed them to my left hand and " held them with my one hand, and *turned in my seat* " towards the harvester." At page 102, he adds the following significant and pointed remark, "When my " horse started to run I had my lines in my left hand " and was *looking back* towards the machine." Can there be any doubt that he permitted his attention to be distracted from this spirited animal which had just been roused by speed, zig-zags and circles,—a high-lifed animal that needed attention, and that needed attention particularly under those circumstances and when so near that mule team of whose susceptibility to fright Twining had been warned only three days before?

(h). At page 50, Salapi, after relating Twining's diversion of attention to Trainor, tells us that "while " that was so, the horse ran at once directly to the " team."

But here, again, Salapi is corroborated by Twining at p. 105, where the latter says, "When I was along-

"side the harvester my horse was walking and the "mule team was walking, too. The reins were in my "left hand. I changed them to my left hand. At "that time I was looking toward the machine and the "sack-sewer was getting out of the harvester on the "side I was on. He started to go toward me. I was "looking toward the harvester. It was then that the "horse ran." And this statement is reminiscent of the statement at p. 102, where Twining says, "When "my horse started to run I had my lines in my left "hand and was *looking back* towards the machine."

(i). At p. 50, Salapi tells us that "When the "boy's horse started to run I saw him get hold of the "line with both hands and try to hold the horse."

Here, again, he is corroborated by Twining, who admits, on p. 103, that "when the horse started to run, "I grabbed the lines with both hands and tried to "hold them."

Is it any wonder that the jury accepted the plaintiff's version of this unfortunate affair, and rejected that of the defendant? As judges of the facts, the jury had a perfect legal right to do this; and when we consider that the showing of the plaintiff was corroborated, both directly and indirectly, by the defendant's own witnesses, we see how it was impossible that the jury could have done otherwise than they did.

But this brief outline is not all. The prospectant features of the case render antecedently probable the contention of the plaintiff that the death of the de-

ceased was caused by the negligence of the defendant. The boy Twining was but a mere youth. He tells us himself that "On July 1, 1912, I was 16 years, 6 "months and 18 days old" (105); and since a man was not necessary to do the work which Twining was doing, no doubt the defendant found it more economical to employ a boy for that job. But the good sense of the jury no doubt discriminated between the man and the boy, and recognized the immaturity and lack of experience of minors. And without doubt, in determining the facts in the cause, the jury considered that minors are not only less capable of understanding the dangers of their employment, but they are also less capable of avoiding the dangers which they do understand (*Alpha P. C. Co.* v. *Curzi,* 211 Fed., 580, 586-7). And see also as to the inexperience of boys in the management of horses, the following cases:

D. H. Ewing & Sons v. *Callahan,* 105 S. W. (Ky.), 387;
McCreedy v. *Stepp,* 78 S. W. (Mo.), 671;
Bamberg v. *International Ry.,* 103 N. Y. S., 297.

Not only was Twining a mere youth, but there was nothing in the case to show any antecedent experience by Twining with animals generally, or in their management, such as would make him alert to the dangers associated with them. Nowhere in the case is there a syllable of evidence to show that Twining actually

had any real, prior opportunities to become, or that he was familiar, with horses, or mules, or mule teams or harvesters in general; or that up to June 27, 1912, he was a frequent visitor to *this* field, or *this* harvester, or was familiar with the harvester or its mule team, or its surroundings, or its associated dangers. The fact is, as Knight explained (38-9), Knight knew very little of him, was not well acquainted with him, did not pay much attention to him and had seen him only a couple of times in the field (38-9), although Knight had been in charge of that harvester and running it for the defendant for fully a month before Spino was killed (37-8). And Salapi saw Twining in that field only twice during the 22 days that he, Salapi, was working on the harvester (51). Nor has any denial been attempted to be made of Twining's unfamiliarity with this harvester, this field, this mule team or its associated dangers, or of the testimony of either Knight or Salapi as to the infrequency of Twining's visits to that field.

Not only was Twining an inexperienced boy, but there is nothing here to show that the horse used by him on July 1, 1912, and furnished him by the defendant, as admitted in that undenied portion of the amended complaint hereinabove quoted, was anything but a strange horse to him. Prior to July 1st, he had not any acquaintance or experience with that horse; and on July 1st, he made his first and only use of that horse, as plainly appears from the testimony of Mc-

Swain (97-8), and the direct admission of Twining himself on page 99, where he states that prior to July 1, 1912, "I had known nothing about this horse at all, "that was the first time I had driven it." There is not, therefore, a word here to show that Twining was acquainted with the disposition of that horse from any past association with the horse, or that Twining was in any position to be justified in taking any chances with that unfamiliar horse, particularly when in close proximity to an easily frightened mule team, and after the warning of June 27th. In a word, the fact of unfamiliarity with a horse, so far from excusing negligence in its management, only makes that negligence the more culpable (*Henry* v. *Klopfer,* 23 Atl. (Pa.), 337, 338). And it may be added that the fact that the horse ran away does not show that he was not liable to run away: indeed, a horse does not have to be vicious in the sense of biting or kicking, in order to run away; and very many horses not vicious at all in that sense do run away because the driver is not familiar with them or their proper management, or drives carelessly, or fails to restrain them, or loses control over them, or for other causes that due care could have guarded against. We submit that our views upon this subject-matter are fully and completely supported by the combined testimony of McSwain and Twining, the former of whom swears that while he had been using the horse in question in his painting business, which horse he describes as a "pretty

high-lifed" horse, Twining borrowed the horse for a single day, and that single day was the very day when Spino was killed (97-8); and the latter of whom admits in plain terms as already pointed out that he had no prior knowledge of this animal and that the fatal day, July 1, 1912, was the first time that he ever drove that animal.

Moreover: This strange horse was furnished to this inexperienced youth by the defendant. The Amended Complaint, in a passage in paragraph IV, already referred to, alleges that "On said 1st day of "July, 1912, said Twining was actually engaged in his "said employment, and for the purpose of enabling "said Twining to perform the duties of his said em- "ployment, said defendant furnished him with a horse "for use in that regard" (21). It is, we think, upon this point, enough to say that this allegation is nowhere denied by the defendant. But, again: Twining had antecedent knowledge of the danger of approaching this mule team in a heedless or careless manner. Knight, who was the defendant's superior employee, well knew the dangers incident to these mule teams: on June 27th, he had warned Twining concerning those dangers: Twining was careless and negligent at that time: he failed to take precautions to retain control over his horse; and, if Twining had been careful and prudent, Knight's warning then given to him should, and would, have been a vivid

part of his mental equipment on July 1st, particularly since he then had this strange and unfamiliar horse.

It is indeed among the plain and obvious facts in this case that, by reason of his experience on June 27, 1912, Twining well knew the danger of approaching a mule team from behind: he also knew that his cart had no brake, which was an additional reason for retaining a sufficient control over the recently excited horse: he knew that he had a strange and unfamiliar horse with which he should take no chances, whose conduct he could not forecast, and that therefore, again, prudence and vigilance were necessary: he knew that the field to his left, through which he had just sped, zigzagged and circled up to the harvester, was clear and open to him, and that, if he had turned into it, he would be taken away from the easily frightened mule team: he knew that he could readily have kept his horse and cart to the rear of the harvester, or could have attached it there, out of all sight, and hearing, of the easily frightened mule team; and all of these elements of knowledge were likewise part of his mental equipment on July 1, 1912. Since the horse that the defendant furnished Twining on July 1st was a strange and unfamiliar horse to Twining, and one with which, if prudent, he would not have taken any chances; since that horse did run away past the mule team, thus frightening it; since the mule team was peculiarly susceptible to fright, especially when suddenly approached

from behind by another animal; since these characteristics of the mule team were well known to the defendant and to other persons engaged in these farming operations (38); since they were well known to Knight, defendant's representative, whose knowledge was that of defendant; since Twining had been specifically warned only three days before; since Knight distinctly testifies that "so far as my observa-" tion of the facts occurring there on that occasion " permits, the harvester did not start Twining's horse " to run, nor did the mules themselves, so far as my " observation went, start Twining's horse to run; I " did not see any member of the harvester do any " act to start Twining's horse or the mules" (43):— in view of all this, was it not negligent on the part of this defendant to entrust this strange animal to the keeping of a boy not shown to have been experienced generally with animals, and not shown to have been experienced or familiar with the horse in question, and send him with this unfamiliar horse into an unfamiliar locality which he had visited only twice before, and where he would necessarily be brought into close proximity with an easily frightened mule team? To employ the language of the complaint, is that the way "to take reasonable and proper precau-" tions to protect said decedent"? Is that the way for the defendant to supply and provide proper, adequate and safe appliances and instrumentalities for the conduct of its operations? Is that the recog-

nized method of providing the decedent with a safe place of work? Was it not carelessness and negligence under all of these circumstances, on the part of defendant, "in causing and permitting said Twin- "ing to use said dangerous and frightening horse"? And do not these facts and circumstances show "neg- "ligence of defendant in failing and neglecting to "provide said Twining with such a safe and gentle "horse as would enable him to approach said har- "vester team without frightening it"? (Amended Complaint, Paragraph V).

The characteristics of Twining, then, were not such as to justify any inference regarding him favorable to the defendant. The state of the evidence before the jury was, and it was the business of the jury as the authorities already cited demonstrate, to draw the proper inferences and deductions from the evidence before them; and that evidence was such that the jury could well believe Twining to have been a young, inexperienced lad, not shown to have been accustomed to the use or management of horses, unfamiliar with mule teams and harvesters, rarely in the vicinity of the harvester and mule team in controversy, unresponsive to the admonition and warning of the experienced operator of the harvester, and handling on July 1st, for the first time, a strange, unfamiliar, and unproduced horse, which, while in charge of this same inexperienced youth, ran away, frightened the mule team and caused the death of the deceased.

But in addition to all of this, we submit that the concomitant features of the case exhibit a plain instance of negligence on the part of this defendant. We have seen that not only was Twining an inexperienced boy, but also that the horse was a strange and unfamiliar horse to him: what then was the character and equipment of this cart? It is plainly evident from the testimony that it was a "little cart" (36): it was not fitted with the simple precaution of brakes (*Choctaw, etc. Ry.* v. *Hollowey,* 191 U. S., 334); and it had but two wheels. If it should be objected that the absence of brakes is not in so many terms alleged as an element of negligence, the answer is two-fold: for, in the first place, the amended complaint (paragraph V) does in terms allege "the carelessness and neg- "ligence of defendant in failing and neglecting to "take reasonable and proper precautions to protect "said deceased"; and in the second place, the fact that evidence, or a fair inference from the evidence, tends to support a charge of negligence not alleged, does not render it improper as long as it has a material bearing upon the charge of negligence that is alleged (See for example, *Cohen* v. *Chicago, etc., Ry.,* 104 Ill. App., 314).

In the next place, it appears that the boy Twining was in the exclusive charge of this horse and cart. But Spino, the deceased, on the other hand, was upon a different appliance altogether: he had no voice in the selection of Twining, or his horse, or cart: he

gave Twining no orders; and he had no control over Twining.

And again, what are we to do about Twining's high speed, zig-zags and circles? On this subject, Twining testified that "Going across the field, I "walked my horse that morning" (100): and in this connection, he undertakes to describe the field in terms which we find difficulty in appreciating. Thus, he tells us that he went through the grain field, but "the stubble was all cut" (100): and a little lower down upon the same page, he makes the remark that "driving across the grain field it is usually plowed "up, and the cart would bounce to one side and the "other, and it would be uncomfortable to trot across, "and I usually walked my horse." Just what he means by the expression "I *usually* walked my horse," we cannot understand: "usual," as every High School Sophomore (110) knows, connotes a general course of frequent or habitual acts or events: but the uncontradicted testimony in this cause is that Twining was a most unusual visitor to that field, and had been there but once prior to the day of Spino's death. On cross-examination, when speaking of the field in which "the stubble was all cut" (100), he tells us that "the "field through which I came was plowed and for "that reason I walked my horse" (105); and the incongruity of all this seems to have been apparent to our learned adversary, for, on p. 110, we find him recurring to this topic, and Twining declaring that

" the field was plowed, I mean before it was planted. " It was not a freshly plowed field." This titubation was not lost by the jury; and the jury having rejected Twining's version of this catastrophe, as they had a perfect right to do, the facts as to Twining's speed, zig-zags and circles while crossing that field are, like the other facts in the cause, settled in favor of the defendant in error by the verdict. And the other testimony in the case leaves no doubt about the high speed, the zig-zags, and the circles indulged in by Twining as he approached through the field to the harvester. We are not dependent for these facts upon the uncorroborated testimony of Salapi: but, as usual in an analysis of Salapi's testimony, we find him fully corroborated by the testimony of the defendant's own foreman, Knight. But what need or occasion was there for this galloping, these zig-zags, or these circles, if this horse were all that the defendant claims it to have been, and if Twining were all that is asserted of him? Why this extraordinary and this unnecessary haste merely to obtain the count of the sacks? Why this unnecessary arousing of the blood in this high-spirited horse, this high-lifed horse, "that needs attention" (41), when no reason, occasion or necessity existed to compel such unusual procedure? Was anybody then dying on the harvester or near it? Was anybody then in need of medical attention there? Was the harvester on fire? What rational excuse can be extracted from the evidence in this case to ex-

plain these acts and this conduct on the part of this inexperienced boy of 16½ years? If there were no roadway in the field through which he came, that would furnish all the more need and reason for careful guidance of the horse by its driver: but nothing seemed to make any difference to this heedless, hair-brained slip of a boy,—because, as Knight points out, he was running over the checks in the field; and indeed, the boy himself admits that "I had to drive "and did drive right over the checks clear across the "field" (100). We submit that these acts of this boy were wholly unnecessary: they subserved no useful purpose: they were not compelled by the character of the ground over which he was coming; and while they do not suggest prudent carefulness, they do suggest the reverse. To what, then, upon the evidence in this cause, are these gymnastic performances to be attributed except Twining's youthful indiscretion, the unruly character of the horse and Twining's difficulty in controlling him after having excited and aroused him? But what comfort can this defendant derive from any one of these explanations? We submit that neither an unruly horse, nor an incapable driver, is as yet a justification for the killing of a human being.

The susceptibility of the mule team to fright is upon the evidence a postulate in this case; judicial notice is taken of the dangers associated with mules (*Southern Ry.* v. *Phillips,* 42 S. W. (Tenn.), 925; *Tobin* v. *Terrell,* 117 S. W., 290), and, as remarked

by the Supreme Court of Missouri, "the mule is a "domestic animal whose treacherous and vicious na- "ture is so generally known that even courts may take "notice of it. The defendant cannot be heard to claim "that he did not know of the treacherous and un- "reliable qualities of this animal" (*Borden* v. *Falk Co.*, 71 S. W. (Mo.), 478, 479); and the fact that the mule team became frightened and ran at the approach of Twining's horse from behind, is in itself evidence that to approach such a team in such a manner was a very dangerous and negligent thing to do. The truth is that when Twining reached the harvester, he became inattentive to his unfamiliar horse, carelessly allowed his attention to become distracted, and negligently lost control over the animal. After Twining's galloping, zig-zags, and two circles, he finally and at last got alongside the harvester: but since no claim can be made, in view of this verdict, or the testimony of the defendant's own foreman, Knight (43) that either the mule team itself, or the harvester, or any member of the harvester crew, started that horse to run, it plainly follows that the starting of the horse to run can only be attributed to Twining's failure to exercise proper care to preserve control over the animal, which failure or inadvertence is of the very essence of negligence. The defendant's answer denies that Twining's horse was a restive, fractious, frisky or vicious animal: it denies that the animal was not easily controlled: it denies

that the horse was liable to run away; and it denies that the horse was a dangerous animal with which to approach the harvester team, because of its frightening the mules, or for *"any other reason or at all"* (27). In the face of the testimony here, these denials plainly amount to nothing: but if, purely for the sake of the argument, we assume these denials to be well founded, and if it also be true that no cause for this runaway can be charged to the mules, the harvester, or the harvester crew, then the only cause left would be Twining's inattention and failure to control his horse.

And the facts bear this out: the situation was precisely one well calculated to bring about a careless loss of control over the horse that was particularly reprehensible and culpable in view of the warning given only three days before. What, indeed, was the course of events as disclosed in the testimony? It appears that when the horse and cart had reached a point alongside the harvester, they were not, at that point of time, going at a high rate of speed, but had slowed down to a walk, so as to obviously enable Twining to receive the count of the sacks from Trainor, as the defendant had employed him to do. At that time, as both Knight and Salapi tell us, the mule team was quiet: it was doing nothing whatever to frighten Twining's horse or to start it running. And here it is to be observed that Twining himself admits the truth of the testimony of Knight and

Salapi in this regard: because he tells us on page 105 that "When I was alongside the harvester, my horse " was walking and the mule team was walking, too." It is not, we submit, an extravagant or unreasonable assumption to make that, at this point of time, Twining's mind was naturally immediately concerned with securing from Trainor the count of the sacks: that was what Twining was there for: that was what the defendant employed him for: that was what he intended to do; and as the sequel shows, he was more concerned with obtaining that count than he was with the prudent and careful retention of control over this horse.

Moreover: at that point of time, Trainor had started to come towards Twining from the harvester: the harvester and the horse and cart were moving on parallel lines toward the west: the horse was in front of Twining, while the harvester was on his right side; and as Trainor left the harvester, Twining's attention was still further distracted from the horse to the approaching man from whom he expected to receive the count of the sacks. And Twining himself is compelled to admit these facts: he admits that his horse and cart were moving in the same direction as the harvester at a walk; and he admits that "at that time, I was *looking toward* the machine " and the sack sewer was getting out of the harvester " on the side I was on. He started to go toward me. " I was looking toward the harvester. It was then

"that the horse ran" (105). In other words, when Trainor started from the harvester towards Twining, Twining, with the horse in front of him, and the harvester on his right side, faced the approaching Trainor, and while looking at him, and away from the horse, the horse ran.

And at that point of time, when Trainor "started to go" (105) toward Twining, Twining's attention was further diverted from the horse to Trainor by the conversation that ensued between them. Salapi informs us of the fact of this conversation; and no reason has been exhibited here why Salapi should not have told the truth about this fact as he did about other facts,—no reason is shown here why, if Salapi told the truth about the other circumstances, he should falsify about this one; and Salapi was and is without motive or interest in this case. On the other hand, Twining declares, "I did not have any talk with the "man on the machine that got off the machine" (102): but in this connection it is proper to note that Twining, the person accused of the negligence which brought about the death of the deceased, and who has every motive in the world to seek to exculpate himself from that accusation (*Ernst* v. *Hudson River Ry.*, 35 N. Y., 1, 23 top, 24 bottom), makes a very unsatisfactory and self-contradictory statement concerning the talk between himself and Trainor at the crucial moment in this history. In one breath, as we have seen, Twining states that he had no talk with

Trainor: but, in the next breath, he admits that while in the office of Miller & Lux, with Mr. Wallis and Mr. Knight, after the accident, Mr. Wallis wanted to know how it was that this man was killed, and that Mr. Knight then and there charged him, Twining, with being responsible for the accident, and that Twining said nothing and remained silent (106); and on top of this, on page 109, he declares that he does not remember whether there was some little talk, at the time in question, between him and Trainor; and in addition to that, on page 110, of the Record, he tells us that he does not remember whether at the time when he was in his cart alongside the harvester, with the mules walking and his horse walking, and this sack sewer stepped out of the harvester and started to come towards him, right at that time, and just before the horse ran, whether or not there was a conversation between him and the sack sewer in which he said to the sack sewer that the horse had run away twice with him that very morning; and surely if there was any fact which this boy could remember correctly—if he does remember anything correctly—it would be the fact of this conversation which ensued at this time, while his attention was directed to Trainor and while he was expecting to receive the count of the sacks which the defendant had sent him out there to get.

But, as Trainor "started to go" (105) toward Twining, Twining had the reins in his left hand; and upon

this point, there can be no controversy, because Twining fully corroborates the statement of Salapi as to this fact. As the situation then stood, the reasons why Twining's attention was distracted from this high-lifed horse, this spirited animal which needed attention, and whose blood had just been aroused by the galloping, the zig-zags and the circles, but of whose disposition Twining was ignorant, were plentiful: there was his youthfulness and inexperience; there was his predisposition to carelessness as illustrated by his conduct in approaching the harvester through the field; there was his anxiety to obtain this count that he had been sent to get; there was the approach of Trainor; there was Twining's talk with Trainor at the crucial moment, when his attention was withdrawn from his horse and devoted to Trainor; there was the fact that, just at that instant, both the horse and the mules were then quiet and walking, and nothing was then, at that instant, happening to direct or compel immediate attention to them; and there was the fact of Twining's youthful indiscretion and carelessness, through which he took a fatal chance with a strange, high-lifed, excited horse, by letting the lines slip down. In a word, as Trainor started from the harvester, Twining naturally turned towards him, especially as there was conversation between them, thus diverting his attention from the horse and causing him to lose control over the animal by slacking the lines, which gave the horse his head, and allowed him to run, where-

upon all of the disastrous consequences followed. There was obviously a reason why that horse felt that he could run. He ran because he was a restive, fractious, frisky, vicious animal, not easily controlled, liable to run away, and a dangerous animal with which to approach a harvester team, because of frightening the mules: and he ran because Twining negligently allowed him to do so. No other theory, we submit, is authorized by the evidence: but upon this theory there can be no doubt about the responsibility of this defendant. If that horse was a dangerous animal with which to approach this easily frightened mule team, or if he were a horse which was not easily controlled, or a horse liable to run away, or was a restive, fractious, frisky or vicious animal, this defendant was plainly negligent in sending such an animal in charge of this inexperienced boy to such a place close to those easily frightened mules; and if, in addition to this, the boy Twining negligently lost that control which is exerted through the reins, and thus allowed the horse to run, this furnishes an additional ground upon which to base the responsibility of this defendant. The obvious result is that this tragedy is to be attributed to the dangerous character of this horse and to Twining's carelessness, inattention and diversion of attention from the horse to the approaching Trainor, whereby Twining lost control of the animal by slacking the reins, giving the horse his head, and allowing him to run, whereby the conse-

quence followed, in natural sequence, of the death of the deceased. It may be added that any claim that Twining was careful to retain control, is met, also, by the great distance that the horse ran before the lost control was regained: on cross-examination, Mr. Knight testified, speaking of Twining's horse, that "His horse ran about two hundred yards *before he* "*got control of it*" (47): Twining himself corroborates this by admitting that "The horse ran *until I* "*got him entirely under control,* I should say a block, "about 300 yards" (103): since the horse ran as far at least as two hundred yards, he plainly must have gotten his head very well, and had a good start, particularly since Albano tells us that Twining "was "holding the horse pretty strong" (36), and Twining himself admits, at page 103, "When the horse started "to run, I grabbed the lines with both hands and "tried to hold them"; and the distance that this horse ran before control was recovered, supports our claim, we think, that he was not under control as he should have been if reasonable care had been exercised by Twining.

The defendant would have us believe that this horse was the personification of meekness: but if that horse were so meek, if he were not unruly and liable to run away, and if Twining were a proper person to put in charge of him, why did not Twining continue to control him after he had got alongside the harvester and when the animal was in a walk? If, on the other

hand, this horse was so very meek, if Twining was exercising the care and control of a prudent and experienced driver, and if neither the harvester nor the mules, nor any member of the harvester crew did any act to start that horse, why did the horse run? If, as Knight says, and as Twining agrees, the mule team was quiet when Twining came alongside the harvester at a walk, if the horse also was then quiet and under proper control, and if Twining was careful and prudent to keep that meek horse under that proper control, why, in the name of all that is rational, did that horse run at all? We submit, that upon this defendant's theory, the running of that horse is inexplicable: but upon our theory, it is naturally explained by the inherently dangerous character of this high-lifed spirited animal that needed attention, and by this inexperienced boy's negligence in losing control over the horse by carelessly slacking the reins while his attention was diverted from the horse to Trainor. We submit the plain truth to be that the jury was entirely right in refusing to adopt the defendant's views and in rejecting them: because, upon any reasonable analysis of the evidence in this cause, what other inference was open to practical men except that this horse was a dangerous animal and liable to run away, and that Twining exhibited a minor's carelessness, negligently lost his control over the animal, and negligently permitted that animal to run. There was no other adjacent danger or cause to explain the starting of

Twining's horse except the liability of that animal to run, coupled with Twining's negligent loss of control. The evidence establishes that the starting of Twining's horse was not caused by the presence of the mules, or of the harvester itself, or by any act of any member of the harvester crew. Neither Trainor, nor Knight, nor Salapi, nor Albano, nor the harvester itself, did anything to frighten or to start either Twining's horse or the mule team: as Knight testified, and without contradiction, the ordinary noise of the harvester did not frighten either Twining's horse or the mule team; and while the mule team was accustomed to the regular noise of the harvester, yet it was peculiarly susceptible to fright when approached in the rear by another animal, particularly where that animal is traveling at a high rate of speed. When Knight lost sight of Twining, just before the runaway, both horse and mules were perfectly quiet and were walking. Hence, applying to the whole of the evidence the familiar logical process of exclusion and elimination, the only cause that is left to explain the running of Twining's horse is the inherent liability of that spirited animal to run, coupled with Twining's careless loss of control when his attention was diverted to Trainor,—a loss of control resulting from that carelessness so characteristic of a minor. And just here, we respectfully urge upon the Court, in accord with the authorities which have heretofore been referred to, that no countenance should be given to any attempt to

travel outside the record in this cause for the purpose of imagining or conjecturing other causes for the starting of this horse than those disclosed by the evidence: because that would simply be, we submit, in the first place, to imagine, guess or conjecture a possible other cause not exhibited in the evidence; and, in the second place, then to apply such other imagined, guessed or conjectured cause to this transaction, as if it had been proved instead of having been merely imagined, guessed or conjectured. And we further respectfully urge upon the attention of the Court the proposition that the restiveness of this horse is not the only charge of negligence made here: that there are other allegations formulated in the complaint; and that, as we have seen, where several acts of negligence are alleged, it is quite sufficient that some one be proved: it is not necessary to recovery that all should be proved. So that, whether this horse was restive or not, whether he was liable to run away or not, there can be no doubt about the duty of its driver, particularly in places where others are occupied in proximity to an easily frightened mule team, to keep his horse under restraint and control, to keep a lookout, and to exercise due care to prevent injuries to others; and whether this horse be restive or not, whether he be liable to run away or not, if there be a negligent failure to perform this duty, if there was, as alleged in the amended complaint, a neglect "to " take any precautions in the care and the driving of

"said horse to avoid the frightening of said harvester "team" (21 *ad finem*), and the horse ran away and caused death, a just liability, we submit, fairly arises. It is every-day common sense that, whether a horse be gentle or not, restraint and control must be maintained over him, particularly when in a situation in which he might cause injury or death; and if by reason of youthful indiscretion, or careless driving, or the lack of restraint, or the loss of control, or some other causes which due care should and would have guarded against, he runs away and kills an innocent man, we submit that it is no answer to say that the horse was not restive. In such cases, it is not necessary to show that the horse was restive: because one's own good sense makes it clear that a horse does not have to be restive in order to run away in a case where, by reason of youthful indiscretion, or careless driving, or lack of restraint, or loss of control, or other cause which due care would have guarded against, the horse is permitted to take, and does in fact take, advantage of such conditions to run away. And what we are concerned with in this cause is the demeanor of this horse on July 1, 1912, when in the exclusive charge of this inexperienced boy, near that harvester mule team, and with that only; and we respectfully insist that the demeanor of this horse at other times, at other places, under different conditions and surroundings, and when in charge of other and experienced men, affords no just inference as to his demeanor on July 1, 1912: his

conduct under one state of conditions would, we submit, be no evidence of his conduct under a different set of conditions; and it is quite common knowledge that the same animal may be quiet under one state of circumstances, but peevish under another. For example, evidence of a mare's conduct in a stable cannot be rebutted by evidence of her behavior in the street (*Brown* v. *Green,* 42 Atl., 991). And the general disposition of this horse, whatever that may or may not be, is not, in one sense, of special interest *so far as the frightening of the mule team is concerned:* because the evidence makes it clear that it is the rapid approach from behind, by another animal, no matter whether that other animal be gentle or not, which frightens the mules; and even the gentlest of horses, under such circumstances, would frighten a mule team.

And we submit that the retrospectant features of the case are, likewise, consistent with the plaintiff's contention, and inconsistent with that of the defendant below. What, indeed, we may ask, existed to prevent Twining from getting the count but avoiding the mules? If this horse were so gentle and meek, and if Twining were so careful and prudent, and if he had this horse so well under control, and if he had not lost control, what was there to prevent him from keeping to the rear or side of the harvester back of the sack-sewer's position? Twining had, or should have had, Knight's warning of June 27th, ringing in his ears: Trainor would have brought him the count, as he was prepar-

ing to do; and on receiving it, Twining could readily have turned about in that small two-wheeled cart, and gone back the way he came, without coming at all into dangerous proximity to those mules that he knew were easily frightened. Why did not this model of prudence adopt this simple and effective course, there being nothing to prevent him? There was no real necessity for Twining getting so close to the harvester as he did, or getting alongside of the harvester at all: there was nothing whatever, so far as the facts in this case permit us to see, to have prevented Twining, instead of going alongside the harvester, from keeping his horse and cart to the rear of the harvester, out of the way of all danger whatever, either to himself or to others, and following along behind the harvester, out of sight and out of hearing of the mule team: with no effort whatever, Twining could have done this thing, could have procured the count of the sacks, and then returned by the same way by which he came to the harvester, thus avoiding proximity to the mule team. If Twining, instead of placing his horse alongside the harvester, had placed his horse behind the harvester, there would have been much less probability of that horse running ahead, and the horse, with the obstruction of the harvester in front of him, would have been much more amenable to control; and there was no reason why Twining, if he had brought his horse to a place of safety in the rear of the harvester, could not as conveniently and expeditiously

have received the count of the sacks, as with his horse alongside the harvester, because, if Trainor, as Salapi tells us, was going towards the cart to give Twining the number of sacks (Trans., page 12, lines 15 to 21), there is no reason known to us why Trainor would not have done this quite as readily if the cart were behind the harvester instead of alongside of it. No reason consistent with Twining's proper control over that horse can be advanced to explain why it was necessary for his horse to have run away; and knowing the generally recognized fact that a mule team is highly susceptible to fright, and having received a very emphatic rebuke in that regard only three days before, Twining should, if he sincerely desired to avoid frightening the mule team and to avoid any accident consequent thereon, have kept his horse and cart to the rear of the harvester, instead of approaching that harvester in such manner as to bring his horse into dangerous proximity with the easily-frightened mule team.

And when Twining's horse started to run, why did not Twining jerk him sharply to the left? Knowing the danger of approaching the mule team from behind at a run, and having a clear field to his left, still, instead of turning his horse off sharply to the left, as he could have done with this horse so meek and gentle, he actually allows the animal to parallel the course of the frightened mules until *they* do the turning off sharply to the right; and he did this for at

least 100 yards. The character of the little cart would have facilitated a sharp turn to the left on one of its two wheels: after the damage was done by starting the mules, Twining could *then* turn to the left: why did he not do so upon the instant when the horse started, if that horse was so meek, and if he were so alert and careful? But he took no precautions and made no efforts even then to avert this disaster: he made no attempt to resort to an expedient which is not infrequently employed under similar circumstances; and all this was because he had carelessly lost control of the animal, had not then yet regained it, and so, through his own boyish carelessness, failed to take this ordinary precaution in due time,—in point of fact, he never grabbed the lines until the horse started to run, which was too late, admitting on page 103 of the record, *"When the horse started to run,* I " grabbed the lines with both hands and tried to hold " them."

What construction shall be put upon Twining's abrupt departure from the scene? Knight tells us that when the damage was done, Twining left the field and " did not return to the scene" (43-4): Twining tells us that after the damage was done he drove back, but not all the way back, only within talking distance (104): but here, as elsewhere, the verdict of the jury settles the facts in the plaintiff's favor. If Twining were not at fault, why did he leave the scene without offering help? This conduct, like that of flight in

the criminal law, is suggestive of fault and fault only, —of the guilty conscience: there was every reason why he should return: there was no reason but one why he should go. And we see that guilty conscience again exposed in that scene in the office where, in the presence of Wallis, Knight charged Twining with being responsible for the accident that caused this death, but Twining "said nothing and remained silent" (106). There is no pretense that he did not hear, comprehend and understand Knight's accusation—the fact that he remembered and admitted the occurrence establishes this: the truth of the facts embraced in Knight's statement was within Twining's knowledge: he was at perfect liberty to make a reply—in fact, Wallis was desirous of replies; and the accusation was made under such circumstances and by such a person (an eye witness) as naturally to call for a reply, and for a denial if he did not intend to admit it. Surely, if Twining were innocent of Knight's accusation, that was the time and place in which, and those were the circumstances under which, we should expect him to proclaim that innocence with vigor and persistence,—but he "said nothing and remained silent." Thus, as Hamlet hath it, "conscience does make cow-" ards of us all." And in line with this conduct is the fact that from the date of this death on July 1, 1912, until May 18, 1915, no word of explanation ever was uttered by Twining, either at the Coroner's inquest, or upon the former trial of this case, although no

satisfactory reason appears to show that he was inaccessible to the defendant upon either of those occasions: never before prior to May 18, 1915, almost three years after the death of Spina, so far as the evidence advises us, has Twining broken his silence by an explanation of any sort.

We respectfully submit that it clearly results that, in addition to the direct testimony of Albano, Knight and Salapi, a fair consideration of the whole evidence leads to the conclusion of negligence,—a conclusion which is strengthened, we think, by every fair inference from the facts developed. Twining and his horse and cart were a necessary instrumentality of the defendant's business: on July 1, 1912, this instrumentality was in a position where it could have brought about this death: it was adequate, as the sequel showed, to bring about that death: no other agency is shown by the evidence to have caused this death: no other agency can be imagined, or guessed at: no fault of the dead man anywhere appears; and that death, we submit, would never have occurred if Twining had exercised only a fractional part of the ordinary prudence that the law requires. We submit that it is impossible to excuse this defendant for sending that inexperienced youth, with that unfamiliar horse, to an unfamiliar scene, and into dangerous proximity to an easily frightened mule team.

And in addition to the direct testimony of Albano, Knight and Salapi, when we pass in review Twining's

youth; his lack of experience with animals and harvesters; the use by Twining of an unfamiliar horse on July 1, 1912; the well known susceptibility of the mule team to fright; the absence of any proof that Twining's horse was frightened by the mules, the harvester, the harvester crew, or any other adjacent danger or cause aside from Twining; the exclusion and elimination of all other assignable causes, except Twining's negligence; Twining's negligent loss of control over the horse by slackening the governing reins while his attention was diverted to Trainor; Twining's guilty behavior in departing from the scene without offering help; the absence prior to this second trial of any explanation by him—good, bad or indifferent; and all the other facts and circumstances in the case—when all these things are considered, together with all reasonable inferences to be drawn from them; when they are all taken together as they should be, both in connection with the testimony of Albano, Knight and Salapi, and also independently of it; and when that jury applied to these facts their good, practical common sense, can anyone say that they should have hesitated in drawing the inference that, through the culpable negligence of this defendant, this human life was snuffed out.

In an Oklahoma case where there was no eye witness whatever to the origin of the fire which caused the death of the plaintiff's wife and two children, the Supreme Court of Oklahoma in rejecting the con-

tention that the facts were not sufficient to justify the conclusion of negligence, and in affirming a verdict in favor of the plaintiff for $14,500, said:

> "We think that where a known agency is known to exist which is sufficient and liable to produce the result complained of, and is traced to a position in which it might produce such result, and the result has been produced, and there is no other known agency at that point capable of producing such a result, a strong inference is raised that such known agency was the proximate cause of the injury that follows."

Waters-Pierce Oil Co. v. *Deselms,* 89 Pac. (Oklahoma), 212, 216.

In this case, the Supreme Court of Oklahoma went very fully into the right of a tribunal to infer the existence of an ultimate fact from the probative facts shown on the trial of the cause: but the Oil Company was not satisfied with the affirmance of the judgment by the Supreme Court of Oklahoma, and prosecuted a writ of error to that court from the Supreme Court of the United States, and there renewed, repeated and amplified most of the contentions made before the Supreme Court of the State. The Supreme Court of the United States, however, after a brief discussion declared that:

> "It is not unnecessary to further elaborate the subject, because of the very full and accurate re-

> view of the tendencies of the proof in relation to the matter made by the court below in its opinion";

and affirmed the judgment.

> *Waters-Pierce Oil Co.* v. *Deselms,* 212 U. S., 159, 176-7.

THE ASSIGNMENTS OF ERROR CONSIDERED SERIATIM.

The Assignments of Errors fail to exhibit affirmatively any error calling for a reversal of this judgment.

The plaintiff in error has filed herein 27 assignments of error, and these assignments are susceptible of classification. Thus, assignments numbered from I to IX, inclusive, and assignments numbered XXIV and XXV, deal with alleged errors said to have been committed during the course of the trial below. Assignments numbered from X to XXIII, inclusive, deal with alleged errors said to have been committed with respect to the charge to the jury in the trial Court. Assignment Number XXVI deals with the alleged insufficiency of the evidence, and in that regard, contains eighteen subdivisions. And assignment numbered XXVII deals with alleged error in the verdict rendered in favor of the plaintiff and against the defendant. We shall endeavor to discuss these assignments as briefly as possible, following their numerical order.

Assignments Numbered I to V.

Assignments numbered from I to V may be conveniently dealt with together, inasmuch as they are concerned with the same subject matter. We have heretofore offered some suggestions as to the insufficiency of these assignments, considered from the point of view of the rules which determine how an assignment of error shall be made up. We wish now to point out that, granting for argumentative purposes only, the sufficiency of these assignments, still, they are not valid in substance. We submit that a knowledge of the facts out of which a duty springs is an element in determining whether there has been any negligence, and especially so in determining the care to be exercised; and where knowledge on the part of a defendant of a defect or danger is shown, negligence may be inferred,—as where the defendant's servants had been warned (*Allis Chambers* v. *Reilley Co.*, 143 Fed., 298; *O'Neill* v. *Blase,* 68 S. W., (Mo.), 764). The rule seems to be that any facts tending to show knowledge by or notice to a defendant of a defect or danger, are admissible; and it is upon this principle that it is competent to show complaints or warnings to the defendant or its representatives (*Smith* v. *Whittier,* 95 Cal., 279). In *Smith* v. *Whittier,* just cited, the Supreme Court remarked:

> "As negligence is the violation or disregard of "some duty or obligation which one owes to an- "other, it is evident that a knowledge of the facts

"out of which the duty springs is an essential ele-
"ment in determining whether there has been any
"negligence. In certain relations, such knowledge
"is conclusively presumed, while in others it de-
"volves upon the party charging the negligence
"to show that the knowledge existed. Especially
"is such knowledge an element in determining
"the care to be exercised in the use of some me-
"chanical or natural agency, whose superior force
"demands skill in its management, to prevent its
"getting beyond ordinary control. The amount of
"care requisite in such a case depends upon the
"extent to which the knowledge goes. The mode
"in which an appliance involving such agency is
"to be used is as material as the manner in which
"it is constructed, and if one mode of its use is
"free from danger and another not, it is relevant
"and material to show whether the defendant
"knew how to use that mode which was free from
"danger, since his knowledge of the proper mode,
"and his failure to exercise it, would be evidence
"of negligence. 'Facts which were known to him,
"or by the use of proper diligence would have
"been known to a prudent man in his place, come
"into account as part of the circumstances.' (*Pol-
"lock on Torts,* 356). . . . Whenever the
"knowledge or information of the party charged
"to have been negligent is a factor in determining
"such question, it is proper, for the purpose of
"showing such knowledge or information, to show
"that notice was given to him, and that he was
"informed of the facts which would constitute
"negligence; and there is no better mode of show-
"ing this than by the evidence of the party himself
"that he had received the information. . . .

"Upon these principles, when Ravekes was told
"in what way the elevator should be run, and
"what would be the consequence of running it
"otherwise, the receiving of that instruction be-

"came a distinct fact in the case, and could be "shown by any one who heard it. His own ad- "mission, whether upon the record or as a witness "at the trial, that such instruction was given him, "obviated the proof by any other witness, but "cannot be considered as hearsay. 'As matter of "evidence and practice, proof of actual knowledge "may be of great importance. If danger of a "well-understood kind has, in fact, been expressly "brought to the defendant's notice as the result of "his conduct, and the express warning has been "disregarded or rejected, it is above hearsay, and "more convincing to prove this than to show in "a general way what a prudent man in the de- "fendant's place ought to have known.' (*Pollock* "*on Torts,* 356.)"

Smith v. *Whittier,* 95 Cal., 279, 291-2, 294.

It was, therefore, proper to bring home to the present defendant, through its representatives, Knight and Twining, knowledge of the danger of approaching a mule team from behind: this evidence established antecedent knowledge by the defendant of this danger, long before the death of the deceased; and evidence of notice to the defendant, before the death, of the nature of the dangers to be apprehended, or of the unsafe practices he was employing, is always competent upon the issue as to negligence.

Sunny v. *Holdt,* 15 Fed., 880, 882-3;
N. Y. El. Eq. Co. v. *Blaine,* 79 Fed., 896;
Allis Chalmers Co. v. *Reilley,* 143 Id., 298;
Griffen Wheel Co. v. *Smith,* 173 Id., 245, 247;
Leonard Co. v. *Highbarger,* 175 Id., 340;

Fed. Lead Co. v. *Lohr,* 179 Id., 692;
Am. Shipbuilding Co. v. *Lorenski,* 204 Id., 39, 44;
Locorazza v. *Cantalupo,* 210 Id., 875, 877;
Casement v. *Brown,* 148 U. S., 615, 623-4;
Franklin v. *Angel,* 76 Pac. (Wash.), 84;
Clowdis v. *Fresno Flume Co.,* 118 Cal., 315.

And here it may be noted that *Clowdis* v. *Fresno Flume Co., supra,* has been considered authoritative in the following cases:

Baker v. *Borello,* 136 Cal., 160, 163;
Kippen v. *Ollasson,* Id., 640, 641;
Gooding v. *Chutes,* 155 Id., 620, 623;
Pacific Lumber Co. v. *Wilson,* 6 Cal. App., 561, 562.

We submit, therefore, that the lower court was entirely right in permitting the plaintiff to show that the defendant knew that to permit another animal to go up alongside the mules "might cause a runaway, " and kill somebody, or some of the mules tear up " the machine."

On pages 35-37 of the Brief for plaintiff in error, certain matters are referred to by the plaintiff in error as being "collateral matters"; and in that connection, it is claimed that the evidence of Mr. Knight as to the occurrences of June 27, 1912, was immaterial, that such evidence was not competent for the purpose of proving negligence, but only to show

Twining's knowledge that it was unsafe to leave the horse unattended, and since Twining did not leave the horse unattended on the day of the accident, the incident has no weight; and it is also claimed that the manner in which in approaching the harvester Twining came between a run and a gallop, zig-zagging and circling the horse, is likewise immaterial, because none of these things in any way frightened the mules. In connection with the last point, it is suggested that "the field was a checked field, which "would account for the zig-zagging of the driver" (Record, pages 100-101): but aside from this remark conceding the "zig-zagging of the driver," there is no evidence, either at the place cited or elsewhere in the Record that we can recall to the effect that the "zig-zagging of the driver" was accounted for by the field being checked; and we do not understand on what principle in support of this unauthorized statement reference should be made to the testimony of a witness whose version of the transaction in question the jury declined to believe. That the occurrence of June 27, 1912, was proper to bring home to the defendant and its representatives knowledge of the danger of approaching an easily frightened mule team from the rear, we have already discussed and cited the appropriate authorities; and this view seems to be conceded by the plaintiff in error at page 36 of its brief, as we read the same. As we have made clear, this evidence was not offered to show

negligence on July 1st, but to satisfy the jury that the defendant and its representatives knew and understood the danger of approaching a mule team from behind: for this purpose, upon all the authorities, the evidence was plainly relevant and proper; "but "it was the duty of defendant, if (it) desired the "limitation to be placed on the evidence, to ask the "court for an instruction to that effect. This (it) "failed to do, and it is too late now to make com- "plaint for the first time" (*Liebrandt* v. *Sorg,* 133 Cal., 571, 573). We wish, however, to dispute the assertion of the plaintiff in error that "Twining did "not leave the horse unattended on the day of the "accident." It may be that the boy did not leave the horse unattended, in the sense, and in the sense only, that he did not get out of the cart: but in every other element which goes to make up the concept of inattention, that horse was as completely unattended as if the boy were at the North Pole. When we speak of attention to a horse, particularly when we speak of attention to a high-lifed, spirited animal that Knight declared "needed attention," and when we speak of attention to such a horse which has just been roused and excited and whose blood was up, we mean something more than the boyish carelessness which permits the lines to slip negligently down upon the singletree while his attention is diverted from the horse in front of him to the approaching man at the side of him: if we mean anything in this

connection, we mean an active, prompt, alert, ready and undivided supervision and control over the excited, nervous and spirited animal which needed attention.

The mere bodily presence of the boy in the cart at the time in question was not the attention called for by that care and prudence which the law requires: the negligent loss of control over the animal by carelessly letting the lines fall down upon the singletree while the boy's attention was distracted to Trainor whom he had in conversation, with his face and eyes turned away from this spirited animal, was not the attention called for by that care and prudence which the law demands; and if it be claimed that this horse was attended by this boy on this occasion because, forsooth, the boy did not get out of the cart, we shall have the greatest difficulty in conveying a negative sufficiently emphatic to do justice to our feelings without the use of language inconsistent with the dignity of this court.

As to the claim made on pages 36-7 of the Brief of plaintiff in error that the evidence as to the manner in which the boy approached the harvester across the field should be discredited because the mules were not frightened thereby, we have already stated our views in reviewing the facts in this cause. The issue in the case was an issue of negligence, and the asserted negligence had to do, among other things, with that instrumentality of the defendant's business

which was composed of the boy, the horse and the cart. The mules were particularly susceptible to fright by reason of the sudden approach of another animal from behind: the horse which the boy was driving was a high-lifed, spirited animal which needed attention: the condition of that horse at the time when it ran was a most important and material feature of the existing situation; and the difference in effect upon a high-lifed and spirited animal between driving him up gently to the harvester, and driving him rapidly at a gait between a run and a gallop, with accompanying zig-zags and circles, must be plainly obvious to any reasonable man. In point of fact, the boy's speed, zig-zags and circles made such an impression upon Knight that he went to the harvester brake: "When I saw him approaching " in the way I have described through the field, ap- " proaching the harvester, I went down to the brake " on the harvester" (Record, p. 42); and this conduct could not have failed so to excite that high spirited horse that the failure thereafter carefully to guard him was wholly indefensible.

Assignment VI.

In this assignment, the defendant complains because the probate record in the matter of the estate of the deceased, was received in evidence in the court below. This assignment, we submit, upon its face, shows its insufficiency in point of substance. There can be no

doubt but that there was an issue raised by the pleadings as to whether the plaintiff in the action was duly appointed the administrator of the estate of the deceased; and upon that issue, the proceedings in the local probate court were plainly and clearly relevant. The only objection made to the receipt of this record in evidence was the highly technical one "that the "probate proceedings were in the name of the estate "of Peter Spino, deceased, whereas the name of the "decedent in this case was Pietro Spina." But the most cursory examination, whether of the probate record, or of the pleadings and testimony in this cause, will show that the deceased was known both as Pietro Spina and also as Peter Spino. The caption of the Amended Complaint was "Saverio di "Giovanni Petrocelli, as Administrator of the estate "of Pietro Spina, sometimes known as Peter Spino, "deceased" (17): the caption of the answer in this cause is entirely the same (25); and an examination of the probate record will show that the deceased was known by both names (55-84). Albano refers to the deceased by both names. On p. 35, he tells us that "I knew Pietro Spina, or Peter Spino, in his life-"time": he tells us that "Pietro Spina" was driving the mule team; and he tells us that he was on the harvester when "Peter Spino" was killed: on the first line of p. 36, he speaks of "Peter Spino"; and on the line preceding the last, he refers to the dead body of "Pietro Spina." And on p. 37, he refers twice to the

deceased as "Spino," and once as "Pietro Spino." And so, likewise, with Knight. On p. 39, he refers to the deceased by both names "Spina" and "Spino"; and Salapi, also, on p. 53, calls the deceased by both names, "Pietro Spina" and "Pete Spino." Wallis does not mention the name of the deceased, nor does Safford, McSwain or Miller. Twining speaks of the deceased as "Spina" during his cross-examination. There may be in the Record other illustrations which have escaped us, but these, we submit, sufficiently support our claim that the deceased was known by both names, even if we wrongly assume that the names are not *idem sonans* (*Faust* v. *U. S.*, 163 U. S., 452). Nowhere throughout the Record in this cause is a single fact to be found which in the mind of any reasonable person could throw any doubt or uncertainty over the identity of the deceased; nor can there be found in this Record a single fact to justify any reasonable person in believing for an instant that the defendant below was in any way deceived or misled as to the identity of the man that it conceded was killed on its premises on July 1, 1912.

It may be as well to refer here as elsewhere to that portion of the brief for the plaintiff in error included within pages 42-49, wherein the claim is made, for the first time in the history of this litigation, that there was no evidence that the deceased was either the husband of the widow or the father of the child. In this connection, we respectfully refer to the pro-

bate record generally and particularly to the powers of attorney therein contained appearing on pages 65-71 of that record; and also to the colloquy which went on between the court and counsel which appears on pages 84 and 103-4 of the Record; and also to the testimony of the widow herself which appears on page 85 of the Record; and also to the utter and complete absence of any qualification whatever either of any of the facts apparent at the places referred to, or of any of the inferences which may fairly be drawn from those facts. It is to be observed, that the objections now presented were not made in the court below, and that they are suggested now in this Appellate Court for the first time. If the objection now made, assuming it to have any value, had been made at the trial, it could readily have been obviated: by failure to present these objections at the trial, they were waived; and a party cannot allow evidence to be offered or introduced at a trial without specific objection, and afterwards upon an appeal make an objection which might have been obviated if he had made it when the evidence was offered. In support of this proposition, in addition to the authorities already cited elsewhere in this brief, see:

Flournoy v. *Lastrapes,* U. S. S. C., 25 L. Ed., 406;
Morrill v. *Jones,* 106 U. S., 466;
U. P. Ry. v. *Myers,* 115 Id., 1;
N. Y. Ry. v. *Estill,* 147 Id., 591;

Wasatch Mg. Co. v. *Crescent Mg. Co.*, 148 Id., 293;
Chicago etc. Ry. v. *DeClow*, 124 Fed., 142;
Foltz v. *St. Louis etc. Ry.*, 60 Id., 316.

In the next place, this portion of the brief argues, in substance, that there was no evidence of the identity of the deceased as the husband of the widow or the father of the child because of sundry differences in the spelling of these foreign names. But great latitude is allowed in the spelling and pronunciation of proper names, and in all legal proceedings, whether civil or criminal, if two names are sounded substantially alike, a variance in their spelling is immaterial. Indeed, the difficulty which, "grows out of the "impossibility of applying a general rule where there "are so many varying methods by which men's names ". . . are designated," is fully recognized (*Kreitlein* v. *Ferger*, 238 U. S., 21, 28-9). Sometimes the courts apply the rule of *idem sonans* and sometimes they argue that the true test is not whether the names sound the same to the ear when pronounced, but whether they look substantially the same in print: but the Supreme Court looks at this matter in a purely practical way, remarking that "we need not con- "fine ourselves to the test of *idem sonans*, nor to the "appearance of the name in print, but may employ "both of these, with such additional tests as may be "available in view of what is disclosed by the record" (*Grannis* v. *Ordean*, 234 U. S., 385, 395-398): but in

the cause at bar, we submit that all three of these tests combine to fix the identity of the deceased as the husband of the widow and the father of the child: that is to say, the test of *idem sonans* and the test of the appearance of the name of Spino and Spina in print, and the test of the disclosures of the record, show beyond all question that this plaintiff in error, who passed through two trials of this cause before attempting to make this point, never was deceived or misled as to the identity of the deceased as the husband of the widow and the father of the child (compare also *Bennett* v. *U. S.*, 227 U. S., 333, 338).

It must, of course, be remembered that what we are dealing with here are foreign names, and inasmuch as the sound constitutes the name of an individual, it would seem that any combination of English letters which will approximately produce that sound ought to be sufficient to bring the variant names within the rule of *idem sonans.* In *Beneux* v. *State,* 20 Ark., 97, the court, in holding Beneux and Bennaux *idem sonans,* said:

> "It is insisted by counsel that Beneux is a French "name and that according to the rules of ortho- "graphy and pronunciation in the French language "is widely different in sound from Bennaux. It "may be replied, that however that might be to "the ears and understanding of a Frenchman, the "names would seem to be *idem sonans* according "to our language."

And in *Galveston, etc. Ry.* v. *Sanchez* (Tex. Civ.), 65 S. W., 893, the court, in holding Celia Sanchez and Selia Sanchez *idem sonans,* used the following language:

> "The names were *idem sonans* from that stand-
> " point of the English language, and it does not
> " matter, whether they were so or not in a foreign
> " language. Nor was there any evidence offered
> " as to the Spanish pronunciation of the names,
> " and the court would not judicially know that
> " such pronunciation was different from our own."

So, also, in *Chiniquy* v. *Catholic Bishop,* 41 Ill., 153, the court, in holding that the French name Michael Allaine was *idem sonans* with Mitchell Allen, said:

> "When we consider the great influx of foreign
> " population into our country and the great dif-
> " ficulty existing on the part of those courts as well
> " as the people generally who are not familiar with
> " the language of the country from which it comes,
> " to understand the names, whether written or
> " spoken, by which they are severally distinguished,
> " we should be slow to pronounce that a variance
> " in the name of any one of them, unless it is
> " palpable, which may only be a misspelling or a
> " mispronunciation of it, and that by persons igno-
> " rant of the language in which the name is writ-
> " ten."

So in *Petrie* v. *Woodworth,* 3 Caines (N. Y.), 219, the court held the French name Petris and its English equivalent Petrie *idem sonans.* The court in *State* v. *Timmens,* 4 Minn., 325, took the view that if the English spelling could be pronounced in the French

language so as to give the same sound as the French name that it was not a misnomer. In that case, which was a prosecution for seduction, the name of the prosecutrix was alleged in the indictment as Forest, while the evidence showed it to be Fourai. The defendant was familiar with the French language. The court said:

> "The name Forest is pronounced in French as if "it was spelled Foray, which is almost identical "in sound with the name of the girl as proven at "the trial, which was Fourai; and the Christian "name being the same, the defendant could not "have been misled or in any manner prejudiced by "the misspelling."

And in *Metz* v. *McAvoy Brew. Co.,* 98 Ill. App., 592, the court, while holding Metz and Meetz *idem sonans,* said:

> "They are German names and in pronunciation "are very similar in sound, the letter 'e' in Metz "having very much the same sound as the letter "'a' in such English words as 'pate,' 'rate' or 'fate.' "The sound of the letter 'e' in Meetz being doubled, "is merely prolonged."

See, also, *Gorman* v. *Dierkes,* 37 Mo., 576, where the German name Doerges was held *idem sonans* with Dierkes and Dierges. And *Rape* v. *State,* 34 Tex. Cr., 615, 31 S. W., 652, where the Mexican name Garzia was held *idem sonans* with Garcia. Also, see *Brown* v. *Quinland,* 75 Mich., 289, 42 N. W., 940, where Che-gaw-go-quay, and Che-gaw-

ge-quay were held *idem sonans.* In *People* v. *Fick,* 89 Cal., 144, 26 Pac., 759, the court refused to say, as a matter of law, whether Toy Fong and Choy Fong were *idem sonans,* but said that it was a question for the jury. So, also, in *Boyce* v. *Danz,* 29 Mich., 148, the court said that the question whether Boyce and Bice were commonly pronounced alike was a question for the jury.

It may be added that the courts have very consistently regarded with extreme disfavor the practice of raising objections for the first time in the Appellate Court. The practice is so unfair to the court below and to opposing counsel, that it deserves the emphatic condemnation which it has always received. We have already referred to the opinion of one federal judge referring to what he describes as a "rattle of words" (*N. Y., etc. Co.* v. *Blair,* 79 Fed., 896); and for another example of the attitude of the courts upon this subject matter, we respectfully call the attention of the court to *Slaughter v. Goldberg, Bowen & Co.,* 26 Cal. App., 389, 324-326, where it was held that the failure of the complaint in a cause of action for death to show the existence of the "essential element" of heirs was waived by going to trial in the court below without any distinct and precise objection based upon this specific point, and where the Appellate Court quoted with approval from *T. & P. Ry.* v. *Lacey,* 185 Fed., 226, where the Circuit Court of Appeals condemned similar conduct, and criticised the practice

by which a point "was held in ambush till the case " reached this court, when it came out in the open. " We think it too late to present that defense."

We have just been dealing with what we cannot help but regard as a mere quibble over the names Spina and Spino; and, while upon that subject, may just as well offer a few suggestions as to some other matters of cognate character which are referred to in the brief herein on behalf of plaintiff in error. We think that this may as well be done now, so that this entire subject-matter may be dealt with principally in one place. In the brief for the plaintiff in error, the claim is made between pages 49 and 51 that the Record fails to show that the lower court had any jurisdiction of the case made by the Amended Complaint, and that, for this reason, the judgment should be reversed. In this connection, it is said that "the " original complaint showed no diversity of citizen- " ship": but that was not necessary, since the original complaint shows upon its face that it was filed in the State, but not in the Federal Court, and that it was not invoking the jurisdiction of the latter court. But, in this connection, it is also said that "the petition " for removal alleged that defendant was a citizen " of Nevada, and the plaintiff Nordgren was a citi- " zen of California, and Jovetta Spino and Sunda " Spino were subjects of the Kingdom of Italy. On " these allegations the case was removed" (Brief, p. 49). It further appears, from page 13 of the Record,

that, on September 14, 1912, the "Certified Transcript "of Record on Removal from Superior Court of Mer- "ced County" was filed in the office of the Clerk of the Court below: that this record consisted of "the "complaint, petition for removal, bond on removal, "notice of filing petition for removal, demurrer, and "order of removal" (See Certificate of County Clerk of Merced County, Record, p. 12); and that the præcipe for transcript of record on this writ of error, filed herein on behalf of the plaintiff in error, enumerated, not the entire contents of the "Certified "Transcript of Record on Removal," but only a portion thereof, to wit, the complaint and demurrer (See Note by Clerk, Record, p. 13; Præcipe, Record, p. 162). But that the cause was removed from the State to the Federal Court, there can be no question: the record here evidences that; and the plaintiff in error tells us that "The defendant (below) caused the case "to be removed into the United States District Court "on a petition alleging that the defendant was a citi- "zen of Nevada and the said heirs to Spino were "subjects of the Kingdom of Italy" (Brief, pp. 1-2). In addition to all this, there is on file in this court a stipulation supplying the omission from the Record of the remaining portions of the "Certified Transcript "of Record on Removal from Superior Court of "Merced County"; and the whole of that Transcript is now available. Removal proceedings are in the nature of process to bring the parties before the Fed-

cral Court; and when that result is accomplished by voluntary action, the court will not of its own motion inquire into the regularity of the procedure where no seasonable objection thereto has been made (*Mackay* v. *Unita Dev. Co.,* 229 U. S., 173, 176): but upon what principle of fairness, a defendant who was the sole actor in the removal proceeding, and who alone procured the removal of the cause into the Federal Court can base a claim upon an alleged imperfection in his own handiwork, we are unable to understand. Modern views on the subject of removal proceedings have grown more liberal (*Kinney* v. *Columbia S. & L. Association,* 191 U. S., 78); and while it is often said that consent cannot confer jurisdiction, still "the "parties may admit the existence of facts which show "jurisdiction, and the courts may act judicially upon "such an admission" (*Pittsburg, etc. Ry.* v. *Ramsey,* 89 U. S. (22 Wall.), 322); and "it is no infringe- "ment upon the ancient maxim of the law that con- "sent cannot confer jurisdiction to hold that, where "a party has procured the removal of a cause from a "State court upon the ground that he is lawfully "entitled to a trial in a federal court, he is estopped "to deny that such removal was lawful if the federal "court could take jurisdiction of the case, or that the "federal court did not have the same right to pass "upon the questions at issue that the state court "would have had if the cause had remained there" (*De Lima* v. *Bidwell,* 182 U. S., 1, 174). That the

consent of the parties may be looked to in a removal proceeding is illustrated by a recent case where the Court said that "We think both parties did so consent " (to the District Court retaining the action), the " defendant by filing the petition for removal and the " plaintiff by proceeding with the trial of the cause, " and at no time objecting to the jurisdiction" (*Phila. etc. Co.* v. *Keslusky,* 209 Fed., 197, 199; and see also *Wm. H. Perry Co.* v. *Klosters,* 152 Id., 967, 969).

In a removal proceeding of the present class, diversity of citizenship is of primary importance to the defendant; and the burden is upon the removing defendant to show, in its petition, the essential facts necessary to give the federal court jurisdiction (*Fishblatt* v. *Atlantic City,* 174 Fed., 196). The jurisdictional facts must appear from the petition for removal; it is this petition which divests the State court of jurisdiction and invests the federal court with jurisdiction (*Johnson* v. *Butte Co.,* 213 Fed., 910); but " while it is true that the facts necessary to give the " federal court jurisdiction must affirmatively appear, " no precise and technical form of words is required, " and it is sufficient if the necessary facts appear in " the record, although stated inartificially and not in " technical language" (*Gruetter* v. *Cumberland T. & T. Co.,* 181 Fed., 248, 255-6). What, then, is meant by "the record"? Is it, as the plaintiff in error seems to think, to be restricted to the pleadings only? On pp. 49-50, of the brief, plaintiff in error remarks that

"The Amended Complaint was filed by Saverio di "Giovanni Petrocelli, and contains no allegation of "his citizenship. . . . The Amended Complaint "does allege that the heirs, Giuditta di Giovanni Pe- "trocelli Spina and Assunta Spina, are residents of "the Kingdom of Italy, but not that they are citizens "or subjects thereof. . . . The heirs are the real "parties in interest, and the administrator a mere "nominal party, and their citizenship is controlling "in determining jurisdiction." But if by all this, it is sought to be contended that, in ascertaining whether diversity of citizenship exists, the pleadings alone are to be looked to, all other parts of the record being disregarded, no greater mistake could be made. As remarked in an early case, "It is true that in cases "where the jurisdiction of the courts of the United "States depends upon the character of the parties, as "it no doubt does in this, the facts upon which it "rests must somewhere appear in the record. They "need not necessarily, however, be averred in the "pleadings. It is sufficient if they are in some form "affirmatively shown by the record" (*Pittsburg, etc. Ry.* v. *Ramsey,* 89 U. S. (22 Wall.), 322—an interesting case on this subject because of its facts); and as pointed out in a late case, "It is not essential that "such diversity of citizenship be averred in the plead- "ings if it otherwise affirmatively appear in the for- "mal record. And further, it is not necessary that "the diversity of citizenship be alleged in the lan-

"guage of the statute, provided the facts appear from "which diversity of citizenship follows as a legal con- "clusion" (*Vestal* v. *Ducktown Co.,* 210 Fed., 375, 377); and the whole record, including the petition for removal was resorted to. There can, indeed, be no doubt upon this point.

In the cause at bar, the petition for removal plainly states that "the heirs" (Brief, p. 49), who "are the "real parties in interest," and whose "citizenship is "controlling in determining jurisdiction" (Brief, p. 50), were "subjects of the Kingdom of Italy" (Brief, p. 49): "the facts stated in the petition for removal "which do not conflict with anything contained in the "pleadings in the suit removed, will be taken as true "unless traversed" (*Camp* v. *Field,* 189 Fed., 285, 286); the facts of interest here, not only do not conflict with anything contained in the pleadings, but also were never traversed, as our Record demonstrates; and therefore it must be taken to be true that "the heirs" (Brief, p. 50) were "subjects of the Kingdom of Italy" (Brief, p. 49). And not only is it sufficient if the diversity of citizenship appear in the removal papers (*Ostrander* v. *Blandin,* 211 Fed., 733, 735), but non-prejudicial irregularities are not regarded as sufficient to call for a remand (*Crapsey* v. *Sun Co.,* 215 Fed., 132); and whatever the former rule may have been, the present rule is that a remand will be denied in case the question of the jurisdiction of the Federal Court is doubtful (*Drainage Dist.* v. *Chicago Ry.,*

198 Fed., 253, 264). To sum it all up, in a single sentence, where the petition for removal was sufficient to exhibit the diverse citizenship, the judgment will not be reversed because the action was not rightfully transferred (*Connell* v. *Smiley,* 156 U. S., 335). And here it may be added that it is the duty of the petitioner for the removal to file the transcript on removal (*Hatcher* v. *Wadley,* 84 Fed., 913); and that, upon removal, if the suit in the State court is in its nature an action at common law, and a pleading was duly served or filed before the removal, no repleador is necessary thereafter (*Bills* v. *N. O. etc. Ry.,* 3 Fed. Cas. No. 1309; *Dart* v. *McKenney,* 7 Id. No. 3583; *Merchants Natl. Bank* v. *Wheeler,* 17 Id. No. 9439); and the question whether a new complaint should be filed on a removal of a case from a State court is one of practice, and not the subject for which error will lie (*Aetna Ins. Co.* v. *Weide,* 76 U. S. (9 Wall.), 677).

Not only, therefore, was it wholly unnecessary for the plaintiff below to repeat in the amended complaint what had already been established by the untraversed statement of the petition for removal, but the entire procedure of removal was inaugurated by the defendant below for the benefit of the defendant below, and was carried to a successful conclusion by the defendant below. After having thus successfully removed the cause into the Federal Court; after having stipulated, subsequent to the removal (Record, pp. 15-16)

that the present plaintiff, "Saverio di Giovanni Petro-"celli, as administrator of the estate of Pietro Spina, "sometimes known as Peter Spino, deceased," be substituted as the party plaintiff in this action in the place and stead of "G. E. Nordgren as administrator of the "estate of Peter Spino, deceased"; after having likewise stipulated, subsequent to the removal, that the pending demurrer to the original complaint should be sustained, with leave to the "now plaintiff in said "action" to file an amended complaint; after having admitted service of that amended complaint (Record, p. 24); after foregoing any demurrer or plea in abatement to that amended complaint; after answering, subsequent to the removal, to the merits; after having answered this amended complaint without setting up in any way whatever the objection now made; after having, after the removal, fully recognized, both in the above mentioned stipulation, and in its answer, the identity of the parties interested under the correct names; after having gone through two trials of this cause without making any objection of this character; after having thus waived any difference in the spelling of these foreign names:—after all this, is this plaintiff in error now, in this Appellate Court, to be heard for the first time to claim that "a controversy in favor "of Jovetta Spino and Sunda Spino, as heirs of Peter "Spino" was something so vastly different from "a "controversy in favor of Giuditta di Giovanni Petro-"celli Spina and Assunta Spina as heirs of Pietro

"Spina" (Brief, p. 50), as to countenance the affectation of "a new party to the suit" (Brief, p. 50), and the pretense "that a new controversy in favor of peo-"ple not named in the original complaint and respect-"ing the estate of a person not named in the original "complaint" had been "inaugurated by the filing of "the amended complaint"? To go no further, is it permissible first to agree to and assume, in a formal stipulation (Record, pp. 15-16), a particular position in a judicial proceeding, and then to adopt a position flatly inconsistent therewith? That this cannot be done is, we think, made clear by a reading of the following authorities:

Ohio etc Ry. v. *McCarthy,* 96 U. S., 258;
Davis v. *Wakelee,* 156 Id., 680, 689-691;
Kansas etc. Co. v. *Burman,* 141 Fed., 835, 842;
The Triton, 129 Id., 698, 700.

In addition to all this, it should be pointed out to the court that no plea in abatement was filed in the present cause; and that while jurisdiction of the subject-matter cannot be conferred by consent or waiver, still objections to jurisdiction of a person, and other objections to jurisdiction which go in abatement, may be waived, and they are waived, and cannot afterwards be urged in any mode, if the defendant, without properly raising the objection, appears generally and proceeds to trial. The rule, settled by innumerable cases, is that objections as to parties or based upon

mistakes or differences of names of parties, must be raised by a plea in abatement, and if not so raised are waived; and a ground of abatement is waived by pleading to the merits. It is equally well settled that such matters in abatement cannot be urged for the first time upon appeal. These rules are so well settled that it seems almost unnecessary to quote the authorities bearing upon them, but one or two may be referred to (*Breedlove* v. *Nicolet,* 32 U. S. (7 Pet.), 413, 431; *B. & P. Ry.* v. *5th Baptist Church,* 137 Id., 568; *Monroe Cattle Co.* v. *Becker,* 147 Id., 47-58).

In addition to all this, the transcript of record in this cause at pages 15 and 16, shows a formal and deliberate stipulation entered into by the present plaintiff in error, wherein and whereby the plaintiff in error actually, knowingly and deliberately consented to the substitution of the administrator plaintiff as the party plaintiff herein, subsequent to the removal of the cause into the Federal Court. We submit that this operates an estoppel of the present plaintiff in error, in the most formal manner, to urge in this court any objection whatever based upon any assumed difference between the names Spino and Spina: we submit that this stipulation is a waiver of every objection of that kind; and we submit that it is the most convincing evidence which could be desired to substantiate the proposition that the present plaintiff in error never entertained any doubt or uncertainty concerning the identity of the deceased, or was in any way whatever

deceived, or misled, as to the identity of the man who it concedes was killed on its premises on July 1, 1912. In the face of this formal and deliberate stipulation, now to advance any argument predicated upon an assumed difference between the names SpinO and SpinA is to us like the peace of God, for it passeth all human understanding.

And here it may be added that there is respectable authority to support the proposition that where a suit is instituted in a State court by an alien (or, on his behalf,) against a non-resident of that State, and it is removed to the Federal Court by the defendant, the act of the defendant in removing the case from the State to the Federal Court constitutes a waiver of the jurisdiction of the particular court to which the case is removed:

Uhle v. *Burnham,* 42 Fed., 1;
Sherwood v. *Newport News,* 55 Id., 1;
Stalker v. *P. P. Car Co.,* 81 Id., 989;
Creigh v. *Equitable L. & A. Soc.,* 83 Id., 849;
Morris v. *Clark Const. Co.,* 140 Id., 756;
Iowa etc. Co. v. *Bliss,* 144 Id., 446;
Cucciarre v. *N. Y. Ry.,* 163 Id., 38.

And in this connection no difficulty should be experienced by reason of the view expressed in *Mahopochus* v. *Chicago Ry.,* 167 Fed., 165; because in the present case no objection was interposed by the plaintiff below to the jurisdiction of the Federal

Court. As further bearing upon the matters just discussed, we respectfully call attention to the following authorities which we believe bear upon these matters:

Bushnell v. *Kennedy,* 76 U. S. (9 Wall), 387;
Baggs v. *Martin,* 179 Id., 206;
T. & P. Ry. v. *Hill,* 237 Id., 208;
T. & P. Ry. v. *Bigger,* U. S. Adv. Ops., 1915, p. 127;
Fitzgerald etc. Co. v. *Fitzgerald,* 137 Id., 98;
St. Louis etc. Ry. Co. v. *McBride,* 141 Id., 127.

There is another technical objection presented by the present plaintiff in error in its brief, which may just as well be referred to here, because it is in a sense connected with what we have taken the liberty to describe as a quibble over the names of Spino and Spina.

Between pages 37-41 of its Brief, plaintiff in error contends that the plaintiff below made no case for the reason that he was not proved to be the administrator of the estate of the decedent; and this because the bond given by him was not as required by law, and void. The argument is that the statute requires a bond running to the State of California, whereas the bond actually given ran to the heirs—the widow and child.

But this objection was not made below, and is now presented in this Appellate Court for the first time:

it should therefore be disregarded. The solitary objection made at the trial was "that the proceed-"ings are in the estate of Peter Spino, whereas this "man's name is Pietro Spina" (Record, p. 55): no other objection was made, not even upon the motion for a nonsuit (Record, 85-6); and if the objection now urged had then been presented, it could readily have been obviated—if the objection were of any validity in a case of this kind—by giving a new bond, or under C. C. P. 1402, without unduly delaying the trial. But the objection was not made, and it is too late to originate it now (*Ross* v. *Reed,* 14 U. S. (1 Wheat.), 482; *U. S.* v. *Percheman,* 32 Id. (7 Pet.), 51; *Barrow* v. *Real,* 50 Id. (9 How.), 366; *Klein* v. *Russell,* 86 Id. (19 Wall.), 433; *Montana Ry.* v. *Warren,* 137 Id., 348; *Robinson* v. *Belt,* 187 Id., 41, 50; *Rodriquez* v. *Vivoni,* 201 Id., 371, 377). And even the objection that was really made below seems to have been abandoned, because, on p. 43 of the Brief, in another connection, we find the declaration that "it is admitted by the pleadings that "the man who died was named Pietro Spina, although "he was sometimes known as Peter Spino."

In the next place, we know of no decision that this bond was "void": certainly, none of the cases cited lay down any such rule. A bond of this type may be irregular, but it is not void: because it is the intent which controls, and it is sufficient if the intent appear, though not fully and particularly expressed.

As to the intent of the obligor, there can be no doubt: the latter half of the bond evidences that intent fully (Record, p. 82); and a technical objection should not avail to discharge a contract into which a party has voluntarily entered. If we regard as non-existent, or disregard as surplusage, the words "Giuditta Spina "and Assunta Spina," we shall then merely have a bond which has omitted expressly to designate the obligee; but such a bond would be construed with the statute requiring it: and the statute would supply the omission. Such a bond would not be delivered to "Giuditta Spina and Assunta Spina," but it would be delivered to the State of California through its representative, the County Clerk of Merced County; and so far as the sureties are concerned, while upon the one hand a court will not extend relief against them, yet on the other a court will not relieve them from a plain obligation within the intent of their bond. And so it is held that in a bond which is in fact and by its terms manifestly for the benefit of the county to which it should run, the fact that it appears to run to the State is not a variance which will be fatal (*Brown* v. *Ligon*, 92 Fed., 851). So far as an administrator is concerned, the order of time in which the act of receiving letters and the act of giving the bond are performed, does not affect the validity of his appointment, nor invalidate any act performed by him after giving the bond (*Estate of Hamilton*, 34 Cal., 464; *Pryor* v. *Downey*, 50 Id., 388; *Bowden* v. *Pierce*, 73 Id., 459): under probate statutes similar

to those of California, it is held that the administrator's failure to give a bond does not render his letters void, but only irregular or voidable (*Estate of Craigie,* 60 Pac. (Mont.), 495; *Harris* v. *Chipman,* 33 Pac. (Utah), 242); and moreover, he cannot escape responsibility, if he administer the estate, by failing to take the oath and file the bond required by law (*Harris* v. *Coates,* 69 Pac. (Idaho), 475).

In the next place, there has never been any direct attack upon the letters of this administrator: why then, is a case in which we are told by plaintiff in error that "the heirs are the real parties in interest " and the administrator a mere nominal party" (Brief, p. 50), should a collateral attack be permitted upon the letters of this "mere nominal party"? The failure, if any, to give the bond upon appointment as required by statute, does not open the door to collateral attack (*Abrook* v. *Ellis,* 6 Cal. App., 451, 454-5; *In re Wiltsey,* 109 N. W. (Iowa), 776; *Connor* v. *Paul,* 119 S. W. (Mo.), 1006; *Plemmons* v. *So. Ry.,* 52 S. E. (N. C.), 953; and note also, *In re Aldrich,* 147 Cal., 343; and see, also, the conclusiveness of the letters recognized in *Mutual, etc. Co.* v. *Tisdale,* 91 U. S., 238).

There is nothing in the cases cited in our opponent's brief which justly qualifies what has been urged above. Those cases which have been decided under other probate systems, not shown to have been similar to that in force in California, are of no consequence;

and the cases which have been cited from the California courts, appear to be cases not so much of defective, as of absent, bonds. *Staples* v. *Connor,* 79 Cal., 14, does not appear to have been a case of a defective bond open to correction, but it was a case where there was neither administrator nor bond. The point involved here was not decided there; and the case itself was criticised in *Dennis* v. *Bint,* 122 Cal., 39, 43-4, hereafter referred to. In *Ions* v. *Harbiston,* 112 Cal., 260, the administrator acted without having filed any bond whatever. It was, however, held in that case that the circumstance that the administrator did not present his bond for approval until several days after the issuance of letters to him, did not require the issuance of new letters after the bond was given. In *Dennis* v. *Bint,* above referred to, *Staples* v. *Conner, supra,* and *Pryor* v. *Downey,* 50 Cal., 388, also cited by the plaintiff in error here, were criticised; and in *Dennis* v. *Bint,* it was directly held that "if the letters issued had been duly attested, it is un- "questionable that, as against any collateral attack, "they would have been conclusive evidence of her "due qualification and of her authority to act as "administratrix" (122 Cal., p. 42).

And finally, upon this topic, we urge upon the attention of the court in its consideration of this point that:

> "It is settled by the decisions that an action of "the character authorized by section 377 of the "Code of Civil Procedure is one solely for the

"benefit of the heirs, by which they may be com-
"pensated for the pecuniary injury suffered by
"them by reason of the loss of their relative; that
"the money recovered in such an action does not
"belong to the estate, but to the heirs only, and
"that an administrator has the right to bring the
"action only because the statute authorizes him
"to do so, and that he is simply made a statutory
"trustee to recover damages for the benefit of the
"heirs."

Ruiz v. *Santa Barbara Gas Co.,* 164 Cal., 188, 191-2.

In other words, as stated in *Jones* v. *Leonardt,* 10 Cal. App., 284, 286, approved in *Ruiz* v. *Santa Barbara Gas Co., supra,* "The administrator as such has "no interest in the matter, and brings the action only "because the statute says so." We submit that this technical objection should not receive consideration.

Assignments Numbered from VII to IX.

These assignments deal with the testimony of the witnesses Knight and Salapi wherein they stated their opinion as to the manner of character of horse which Twining was driving on the day of Spina's death; and it may be said that, in the main, the testimony which these witnesses gave upon this subject-matter was not contradicted by the defendant when it placed upon the stand its own witnesses. What we are concerned with at present, however, is whether the lower court erred in admitting the testimony of these wit-

nesses upon this subject-matter. The objections which were presented to the admission of this testimony in assignments 7, 8 and 9 are the same; and for reasons which we have already discussed, we think that the objection that the testimony was "incompetent, irrelevant and immaterial," is futile, not only because too vague and general, but also because a mere "rattle "of words," as a distinguished Federal Judge described that objection (*N. Y. etc. Co.* v. *Blair,* 78 Fed., 896). The second of these objections was to the question as "calling for the conclusion of the wit- "ness," and this was followed by the further objection that no foundation was laid for the question; and these two objections may conveniently be considered together. In view of the long experience of Knight and Salapi with both horses and mules, it is difficult to understand what is meant by the statement that the question calls for the conclusion of the witness: and so far as an absence of foundation for the question is concerned, we are at a loss to understand in what respect no foundation was laid, and we are equally at a loss to determine what foundation is meant. If the term foundation has reference to knowledge of and experience with animals,—and this is all that it could have meant, then the record shows that both Knight and Salapi possessed these attributes. It appears from the record, and it so appears without slightest contradiction, that in the course of Mr. Knight's experience in farming, he has had experience

with horses and mules for 30 or 35 years, driving them, breaking them, and all kinds of experience; and that he was acquainted with the habits and manners of such animals; and that his experience covered not only mules, but also horses (38); and that Knight was an experienced and capable man, familiar with his business, an expert in his line, is established by the fact that during 20 years or more he had been employed principally by the defendant, was in the employ of the defendant in June and July, 1912, and was still in the employ of the defendant in May, 1915, when the present case was tried. Surely, if knowledge and experience with animals be the necessary foundation to enable Mr. Knight to give his opinion concerning the horse in question, we have more than sufficient here in the way of such foundation. Salapi, also, was a man of large experience with animals of this kind; and he tells us, equally without contradiction, that "I work with animals . . . I have had experi-"ence in handling mules and horses, and have handled "horses and mules in the old country, in Italy, about "five years, and also in Brazil about fourteen years, "and in California, five years" (48); and here, too, therefore, we find a sufficient foundation to authorize the plaintiff to take the opinion of this experienced man as to the type of horse which Twining was using on July 1, 1912. But the foundation for the admission of this evidence did not rest here. Knight was the foreman in charge of the harvester, and it was his

duty to take charge all over the machine, watch everything, sometimes one thing, and sometimes another (44). And Mr. Knight being on the harvester on the day of this death, saw Twining, that morning, when "he was probably a quarter of a mile away "coming from the south" (41). Mr. Knight continued to watch the boy as he approached the harvester, and had good reason for doing so. His attention was attracted to the approaching boy by the conduct of the horse that the boy was driving; and Knight gives the details of that conduct, telling us that he came up from the south between a gallop and a run, that he was twisting around some, that when he got closer to the harvester he whirled around a couple of times; "I could tell he was coming pretty fast, "he did not pursue a straight line. He was turning "coming around, kind of twisting zig-zag" (41). And in this testimony, Mr. Knight is corroborated by the testimony of Salapi, to the same effect. In other words, these two experienced men had their attention attracted to this approaching horse, and observed the acts and conduct, the speed, the twisting and zig-zaging, and the whirling around in two circles, all with their own eyes; and it certainly did not take these experienced men long to form an expert judgment as to the type and manner of animal it was which they had watched so intently while it was approaching the harvester. Knight had 30 to 35 years experience behind him in giving his testimony, and

Salapi gave his testimony in the light of some 24 years' experience in the same line: it certainly could not be said, therefore, as matter of law, that it was impossible for these men to have formed a judgment then and there, from their experience and their observation of that morning, as to the character of this animal. It nowhere appears in the testimony of Salapi whether he had or had not any antecedent knowledge of the characteristics of this animal, but it does appear from the testimony of Mr. Knight that he had never himself used the horse that Twining was driving on the day in question: he does not know whether he had ever seen it before: he states that he does not know anything about the horse whatever; and all that he knew of his own knowledge about the horse was what he saw on that morning (46); and no doubt, this portion of Knight's testimony may be resorted to in an effort to discount his evidence. But, in the first place, no man of Knight's experience would be deceived for a moment as to the characteristics of this horse, and he would be able, as he did, to appraise the animal's characteristics as soon as he saw him in action; and in the next place, after all, the passage in Mr. Knight's testimony to which we have referred, would affect merely the weight of his testimony, but would have no influence upon its admissibility. Mr. Knight's judgment was founded upon personal knowledge and personal observation of the horse on the morning in question, and in view of

his long experience with animals, he was entitled to state his opinion as to the characteristics of this horse, notwithstanding that he observed the horse in action upon but one occasion, the weight of his testimony being for the jury.

But, in addition to all of this, Mr. Knight was an expert who had the advantage of personal observation of the animal in question; and the plaintiff below was therefore entitled to take his opinion as to the characteristics of the animal in question (*Congress, etc. Co.* v. *Edgar,* 99 U. S., 645; *Walters* v. *Stacey,* 122 Ill. App., 658). And, in addition to all this, the rule of evidence is well settled that witnesses, both ordinary and expert, may testify to their opinions as to the disposition, temper and appearance of animals:

Jones, Evid., Sec. 366; 360 n. 3; 367; 382;
Makesell v. *Wabash Ry.,* 112 N. W. (Iowa), 201:

What frightened a horse;

Lynch v. *Moore,* 28 N. E. (Mass.), 277:

The habits of a horse;

Folsom v. *Ry.,* 38 Atl. (R. I.), 309:

Conduct of the animal;

Noble v. *Railway,* 57 N. W. (Mich.), 126:

Whether safe to drive.

Wilson v. *Ry.*, 29 Atl. (R. I.), 300;
Finlay v. *Ry.* 74 N. W. (Minn.), 174:

Whether driver had horse under pretty good control and seemed to drive carefully;

Yahn v. *Ottemway,* 15 N. W. (Iowa), 257:

What frightened a horse.

Sydleman v. *Beckwith,* 43 Conn., 9;
Clinton v. *Howard,* 42 Conn., 294;
Stone v. *Pendleton,* 43 Atl. (R. I.), 643.

Assignments Numbered X to XXIII.

These assignments of error deal with the complaints of the plaintiff in error against the charge to the jury of the learned Court below: there is nothing unfamiliar in this: the charge is always criticized by the party against whom the verdict is rendered; and, as usual, no attempt is made to discuss the instructions considered in their entirety, and the effort is made, by wrenching particular instructions from their context, to exhibit them as samples of incorrect law. But the fundamental rule is that instructions are to be construed and interpreted reasonably and as a whole, in the same connected way in which they are given, upon the reasonable presumption that the jury will not overlook any particular portion of the charge, but will give due weight to it as a whole; and this, of course, is quite in line with the proposition that "the jurors may be assumed to have ordinary intelli-

"gence and good sense" (*Ballou* v. *Andrews Banking Co.,* 128 Cal., 562, 567). There seems to be no reasonable doubt about the proposition that instructions are to be construed together, to the end that they may be properly understood; and if, when so construed, and as a whole, they fairly state the law applicable to the evidence, there is no reversible error in giving them, although detached sentences, or separate charges, considered alone, might be considered from the point of view of nice criticism, to have been possibly misleading. As observed by the Supreme Court of California, "The practical administration of justice should "not be defeated by a too rigid adherence to a close "and technical analysis of the instructions of the "Court. The instructions are for the enlightenment "of the jury as to the law of the case, and a jury "never enters into such character of analysis in con-"struing them" (*People* v. *Bruggy,* 93 Cal., 476, 486). Speaking upon this subject, in a case which we have already cited in another connection, the Supreme Court very properly says:

> "In examining the charge of the court, for the "purpose of ascertaining its correctness in point of "law, the whole scope and bearing of it must be "taken together. It is wholly inadmissible to take "up single and detached passages and to decide "upon them, without attending to the context or "without incorporating such qualifications and ex-"planations as naturally flow from other parts of "the instructions. *Magniac* v. *Thompson,* 7 Pet., "348.

"Instructions given by the court at the trial are "entitled to a reasonable interpretation, and if the "proposition as stated is not erroneous, they are "not, as a general rule, to be regarded as incorrect "on account of omissions or deficiencies not "pointed out by the excepting party. *Castle* v. "*Bullard,* 23 How., 172 (64 U. S., XVI, 424).

"Appellate courts are not inclined to grant a new "trial on account of an ambiguity in the charge "to the jury, where it appears that the complain- "ing party made no effort at the trial to have the "matter explained. *Locke* v. *U. S.,* 2 Cliff., 574; "*Smith* v. *McNamara,* 4 Lans., 169.

"Requests for such a purpose may be made "at the close of the charge, to call the attention "of the judge to the supposed error, inaccuracy or "ambiguity of expression; and where nothing of "the kind is done, the judgment will not be re- "versed, unless the court is of the opinion that the "jury were misled or wrongly directed."

Congress etc. Co. v. *Edgar,* 99 U. S., 645, 659.

And so, likewise, in a more recent case, the Chief Justice remarked that "Whether the instructions "could have produced misconception in the minds "of the jury is not to be ascertained by merely con- "sidering isolated statements, but by taking into view "all the instructions given and the tendencies of the "proof in the case to which they could possibly be "applied" (*Seaboard Ry.* v. *Padgett,* 236 U. S., 668, 672).

The charge to the jury "must receive a reasonable "interpretation" (*Bliven* v. *New England Screw Co.,* 64 U. S. (23 How.), 430; *First Unitarian Society* v.

Faulkner, 91 Id., 415); and words contained in an instruction should not be subjected to "a nice criti-"cism . . . when the meaning of the instruction "is plain and obvious, and cannot mislead the jury" (*B. & P. Ry.* v. *Mackey,* 157 U. S., 72). Hypercritical niceties should be disregarded; and the language should receive a reasonable construction, in view of all the circumstances, and not a strained or forced one. It is not proper, for example, to seek after some far-fetched and unusual signification of the language used, and endeavor to base a reversal thereon: the language must be given its usual and ordinary meaning: if the language used is capable of different constructions, that one will be adopted which will lead to an affirmance of the judgment, unless it clearly appears that the jury were actually misled; and where the charge was proper in one sense, it will be presumed, on appeal, that the lower court charged in that sense.

Paschal v. *Williams,* 11 N. C., 292;
Davenport v. *Cummings,* 15 Iowa, 219;
State v. Huxford, 47 Id., 16;
Caldwell v. *N. J. Steamboat Co.,* 47 N. Y., 282;
People v. *MacCallan,* 103 Id., 587;
Looram v. *Second Avenue Ry.,* 11 N. Y. St., 652;
Harding v. *N. Y. etc. Ry.,* 36 Hun., 642.

In brief, it is a rule of general acceptance that, in construing a charge, each instruction is to be considered in connection with the entire charge; and that if, considering it as a whole, the court is satisfied that the jury was not improperly advised as to any material point in the case, the judgment will not be reversed on the ground of an erroneous instruction. Under this rule, inartificialities which render instructions open to objection when standing alone, are regarded as harmless if, when taken with other instructions, they properly state the law of negligence applicable to the case in such a way that the jury could not have been misled thereby.

McClellan v. *Burns,* 5 Colo., 390, 395;
Chicago etc. Ry v. *Roche,* 54 N. E. (Ill.), 212;
Fletcher v. *South Carolina Ry.,* 35 S. E. (S. C.), 513;
Louisville etc. Ry. v. *Hiltner,* 60 S. W. (Ky.), 21;
Grube v. *N. P. Ry.,* 11 S. W. (Mo.), 736;
Deweese v. *Mining Co.,* 54 Mo. App., 476;
Short v. *Bohle,* 64 Mo. App., 342;
Missouri etc. Ry v. *Lyons,* 53 S. W. (Tex.), 97;
Ringue v. *Oregon etc. Co.,* 75 Pac. (Ore.), 703;
St. Louis etc. Ry. v. *Hawkins,* 108 S. W. (Tex.), 736.

But, in the next place, in approaching this matter of the charge of the court below, it is proper to

point out that there can be no reversal for the refusal of requested instructions, where the record does not contain the entire charge (*N. P. Ry.* v. *Tynan,* 119 Fed., 288). The general doctrine that the judgment of the court below will be taken to be correct, that error cannot be presumed, and that before there can be any disturbance of the judgment of the court below error must affirmatively appear, is entirely applicable to the correctness of the instructions given to the jury below (*Wiggins* v. *Burkham,* 77 U. S. (10 Wall.), 129; *Corinne, etc. Co.* v. *Johnson,* 156 Id., 374); and this rule goes even to the extent that where the record does not contain all the instructions, it is to be assumed that any others needed were given (*Bennett* v. *Harkrader,* 158 U. S., 441). Since, then, the burden is on the plaintiff in error to show error affirmatively, and, to that end, to show that the record does actually contain the entire charge, and since it was easy enough to insert a recital as to the evidence and proceedings on the trial of the above-entitled cause, why was there not a similar recital attached to what purports to be the charge of the Court? The record, at the bottom of page 114 recites that the Court gave the following instructions to the jury: and these instructions purport to end at the top of page 123: but there is no recital in this record, as to this charge, similar to that which related to the evidence and proceedings on the trial. In other words, for anything that appears to the con-

trary from this record, other and additional instructions were given by the lower court to the jury: it does not appear affirmatively that the entire charge to the jury is contained in this record.

In the next place, in approaching the consideration of the charge of the Court below, it is proper to point out that requests to charge a jury upon an abstract or irrelevant matter, not properly involved in the case, are correctly refused (*White* v. *Van Horn,* 159 U. S., 3; *Hot Springs Ry.* v. *Williamson,* 136 Id., 121; *Coffin* v. *U. S.,* 162 U. S., 664; *Dwyer* v. *Dunbar,* 72 Id. (5 Wall.), 318; *Bird* v. *U. S.,* 187 Id., 118). Thus, for example, in an action to recover damages resulting from the negligence of the defendant, where "gross negligence" is not in the case, and where the defendant concedes "that plaintiff has not "charged defendant with gross negligence," instructions upon the subject-matter of gross negligence, even if we assume them to be intrinsically sound, are nevertheless abstract and irrelevant, and calculated to confuse the jury, and are therefore rightly refused. Instructions, to be given at all, must be upon points relevant to the issue in the case, otherwise they are properly refused.

In the next place, it is proper to observe that in a Federal court, a trial judge is not required specifically and directly to answer every point which may be submitted by counsel; and if the instructions given, taken as a whole, fairly present the law applicable to

the pending issue, nothing further can be required (*Salem Iron Co.* v. *Comm. Iron Co.,* 119 Fed., 593); and in doing this the trial judge is not compelled to use the language proposed by counsel, but may present the case in his own way and in his own language (*Mathieson Alkali Works* v. *Mathieson,* 150 Fed., 241, 251). As remarked by Mr. Justice Bradley:

> "Perhaps some of the abstract propositions of "the defendant's counsel contained in the instruc- "tions asked for, based on the facts assumed there- "in, if such facts were conceded, or found in a "special verdict, would be technically correct. "But a Judge is not bound to charge upon as- "sumed facts in the *ipsissima verba* of counsel, nor "to give categorical answers to a juridical cate- "chism based on such assumption. Such a course "would often mislead the jury instead of enlighten- "ing them, and is calculated rather to involve the "case in the meshes of technicality, than to pro- "mote the ends of law and justice."
>
> *Continental Imp. Co.* v. *Stead,* 95 U. S., 161.

And see, also, to the same effect:

> *Ohio etc. Ry.* v. *McCarthy,* 96 Id., 258;
> *Ayers* v. *Watson,* 137 Id., 584;
> *T. & P. Ry.* v. *Cody,* 166 Id., 606;
> *Cunningham* v. *Springer,* 204 Id., 247.

Indeed, the rule is thoroughly settled in the Federal Courts that where the substance of a request for an instruction to the jury has already been given by the Court, the refusal of the Court to give it again in

different language is not error; and where the court instructs the jury in a manner sufficiently clear and sound as to the rules applicable to the case, so as to correctly guide the jury in its findings, it is not bound to give other instructions asked by counsel on the same subject, whether they are correct or not.

Chicago etc. Ry. v. *Whitton,* 80 U. S. (13 Wall), 270;
Ayers v. *Watson,* 113 Id., 594;
N. W. M. L. I. Co. v. *National Bank,* 122 Id., 501;
Anthony v. *Louisville Ry.,* 132 Id., 172;
Patrick v. *Graham,* Id., 627;
Ormsby v. *Webb,* 134 Id., 47;
Washington etc Ry. v. *McDadd,* 135 Id., 554;
Aetna L. I. Co. v. *Ward,* 140 Id., 76;
N. Y. etc. Co. v. *Winter,* 143 Id., 60;
G. T. Ry. v. *Ives,* 144 Id., 408.

Bearing these principles in mind, let us look at the instruction which is complained of in assignment No. X. This instruction was entirely hypothetical, but nevertheless was relevant to the issues presented upon the trial. It will be observed from a fair reading of the Amended Complaint in this case, that in describing the horse in question, the pleading attributes to that horse some seven characteristics: thus, it is alleged that the horse was (1) restive, (2) fractious, (3) vicious, (4) frisky, (5) not easily controlled, (6) liable

to run away, (7) a dangerous animal with which to approach the harvester: but out of all these characteristics so attributed to this animal, the plaintiff in error, with commendable prudence, seizes upon the single characteristic of viciousness, and discusses the horse as if the solitary characteristic attributed to the animal was that of viciousness. It makes no difference to the plaintiff in error that this horse is claimed by this plaintiff to have been restive: the plaintiff in error will have none of that and insists upon the favorite term "vicious." For another example, we all know that a horse may be frisky without being vicious: but no one could close his eyes more persistently to this distinction than this plaintiff in error. Again, the complaint charges that the horse in question was an animal not easily controlled, but concerning this aspect of the horse's personality, the plaintiff in error is silent, dumb and voiceless. But, not to multiply illustrations of this lopsided point of view, it may be observed that the complaint accuses this horse of liability to run away, and by consequence, a dangerous animal with which to approach an easily frightened harvester team: but it makes no difference to this plaintiff in error that the court of errors and appeals of the State of New Jersey, plainly declares that "a horse does not have to be vicious in order to run away" (*Francois* v. *Hanff*, 71 Atl., N. J., 1128): the plaintiff in error persistently shuts its eyes to every single characteristic attributed to this animal except

that of viciousness,—the motive for which is, of course, entirely transparent. The complaint urges that this animal was not easily controlled, and that it was liable to run away, which characteristics, of course, would make it a dangerous animal with which to approach an easily frightened mule team: but this plaintiff in error is wholly unable to perceive that while evidence which does not show that a horse was vicious in the sense that he was a persistent and malignant biter and kicker, may clearly and plainly establish that the horse is not easily controlled, and liable to run away, and necessarily, therefore, a dangerous animal with which to approach an easily frightened harvester mule team. Very respectable courts of good standing find no difficulty in taking in this plain proposition: but not so with this plaintiff in error. Thus, for example, the Supreme Court of the State of Illinois concedes it to be common knowledge that even tractable and gentle horses will run away when free from restraint, and that every reasonable and prudent man will take precautions to prevent such an occurrence; and in that connection, the learned court said:

> "That horses, although otherwise tractable and
> " gentle, are liable to and do run away when thus
> " freed from restraint, is a common and ordinary
> " experience, against which every reasonable and
> " prudent man takes precaution. There was noth-
> " ing extraordinary in this horse running away,
> " and it might reasonably have been anticipated.
> " No one would think it necessary to prove that

"it was an accident likely to occur; it is a mat-
"ter of common knowledge and experience."

Joliet v. *Shufelt,* 18 L. R. A., 750, 753.

In other words, to adopt the thought of the Court of Errors and Appeals of New Jersey, hereinbefore referred to, viciousness in a horse is wholly unnecessary in order to put the animal in the category of animals liable to run away, and therefore dangerous animals with which to approach an easily frightened harvester mule team; and it is this thought which, among others, gives point to our complaint that in dealing with this animal as if the solitary characteristic attributed to it were viciousness, the plaintiff in error is presenting a very one-sided view of the situation. And since it is the fact, and common knowledge, that horses which are not vicious at all, but are tractable and gentle, will run away when freed from restraint, and that every reasonable and prudent man will take precautions to prevent that occurrence, how much more care then should be taken where the animal, instead of being tractable and gentle, is spirited, high-lifed and in need of attention? And how much more care, then, should be taken when such a spirited, high-lifed horse, which needs attention, has been aroused and worked up, and excited, by being driven rapidly, between a run and a gallop, by being made to take a zig-zag course, and by being made to perform circles? And how much greater is the negligence where that degree of care is not exercised?

And here it may not improperly be pointed out that the term "vicious" as applied to an animal is in substance synonymous with the other characteristics mentioned in the complaint: the term is not limited to a malignant and evil-tempered biter or kicker; but its proper meaning is "a disposition or propensity to do an "act dangerous in its character to either persons or "property" (40 *Cyc.*, 203). Within this definition of the term "vicious" could readily be included such terms and phrases as restive, fractious, frisky, not easily controlled, liable to run away, dangerous because of capacity to frighten: because each and all of these characteristics may well be regarded as synonymous with the expression "a disposition or propensity to do "an act dangerous in its character to either persons or "property"; and therefore, to seize upon the word "vicious" as if it had some secret or mysterious meaning of a peculiarly obnoxious character, distinct from the established meaning above quoted, would be to ignore the familiar rule of construction included in the maxim *"noscitur a sociis."*

That this jury had before it ample evidence from which to make up its mind as to the various characteristics of the horse in question, is, we submit, too plain for extended argument; and it will be sufficient, we believe, to call attention to the portions of the record which deal with this particular subject-matter. Thus, Mr. Knight, the defendant's foreman, describes the horse as a high-lifed horse: he says that the animal was

"one that needs attention"; and he states that in his opinion, it was a spirited animal (Record, p. 41). Salapi tells us that "the horse in my opinion was full "of life" (Record, p. 50). Wallis, the defendant's manager, tells us that "the horse was good life" (Record, p. 88); and McSwain, another employee of the defendant, tells us that "the horse was high-lifed" (Record, p. 97). Of these witnesses, the first two were witnesses for the plaintiff, and the last two for the defendant; but all four were employes of the defendant. Knight was authorized to speak upon this subject because of his 30 or 35 years' experience with horses: Salapi was likewise authorized to speak upon this subject because of his 24 years' experience with horses. Just how intimate was the familiarity of Wallis and McSwain with horses, we are not advised by the defendant: but it does appear that McSwain had known this horse for at least six months (Record, p. 97), and Wallis claims to have known the horse for perhaps two or three years (Record, p. 88). Between Wallis and Safford, the latter another employee of the defendant, there seems to be a difference as to the length of time that the horse in question—if the horse they speak of be the horse in question—was used by the defendant: because, while Wallis claims to have known the horse for two or three years, Safford makes the claim that he knew the horse for some seven or eight years (Record, p. 92). Safford's testimony, however, is of no serious import in the case, because evi-

dently he knew, after all, little or nothing about the horse. Thus he confesses that he does not know how well bred the animal was; and as to his knowledge of the animal's characteristics, his testimony was negative, —he had no knowledge as to the animal being vicious or unmanageable; and finally he *supposes* that the horse he had in mind was the same horse that Twining was using at the time when Spina was killed (Record, pp. 93, 92).

Under all of the circumstances established in evidence, therefore, this jury had before it evidence from which it could have determined whether that horse was restive, fractious or vicious, or frisky, or not easily controlled, or liable to run away, or a dangerous animal with which to approach that easily frightened harvester mule team, or some one or more of these characteristics that entered into the situation upon which negligence is predicated by this plaintiff. And in addition to this, the jury had before them the acts and conduct of the horse and of the boy Twining as they were approaching the harvester from the South: the jury knew that Twining and his horse approached the harvester at high speed, between a gallop and a run: they knew that this approach was not made in a reasonably straight line, but that it was a course best described by the term zig-zag: they knew that as the horse and the boy approached the harvester, but before they got alongside, the boy and the horse whirled around, to use Knight's phrase, in a couple of circles;

and they knew the natural effect of these gymnastic performances in exciting and arousing the blood of a high-lifed, spirited animal that needed attention.

Bearing these considerations in mind, we can perceive the relevancy of the instruction which is complained of in Assignment Number X; and that this instruction is sound law, is apparent from the reasoning and decision in *Clowdis* v. *Fresno Flume Co.,* 118 Cal., 315; and the instruction is further supported by *Noble* v. *St. Joseph etc Ry.,* 57 N. W. (Mich.), 126, where the lower court, *inter alia,* in instructing the jury, remarked that: "In this connection, you are in-
" structed that whatever the defendant's driver, Cong-
" don, before this accident in question, and in the
" course of his employment, learned or discovered with
" respect to the character or disposition of these horses,
" is presumed to have been known by the defendant,
" and the defendant is chargeable with such knowl-
" edge possessed by Congdon."

Finally, it will be observed that the sole ground of complaint by the defendant in error here against the instruction quoted in assignment number X is that there was "no evidence that the horse in question was "vicious": but, as we have seen, there was ample evidence before the jury from which they could reasonably have determined the disposition or propensity of this horse, as it walked alongside the harvester just prior to the runaway, to do an act dangerous in its character to either persons or property (40 *Cyc.,* 203);

and, as the sequel demonstrated, this very horse did "do an act dangerous in its character to either per-"sons or property."

The next complaint of the plaintiff in error is based upon that portion of the charge referred to in the XIth assignment of error; and the ground of complaint here is that this instruction "does not correctly "state the law applicable to said case, in this: that "it instructed the jury that if it found the plaintiff "guilty of any contributory negligence, however slight, "it must find a verdict for the defendant." Let us assume, for the sake of the argument, that there is a schism among the authorities upon the point referred to, and assuming this, how is this plaintiff in error injured? Surely, if anyone could complain of this instruction, it would have been the plaintiff below; and if ever there was an instruction given by a court to a jury which was unduly favorable to a defendant below, this is the instruction, as may be seen at a glance; but the law is thoroughly well settled that, assuming for argumentative purposes this instruction to be erroneous, still an error in the charge of the trial judge which is favorable to one of the parties is not a subject for complaint on his part; and the principle that one cannot complain of a decision favorable to himself, animates the following, among other authorities:

McLemore v. *Powel,* 25 U. S. (12 Wheaton), 554;

McMicken v. *Webb,* 47 Id., 600, 292;

Reed v. *Proprietors,* 49 Id. (8 How.), 274;
Scott v. *Sanford,* 60 Id., 19 How., 393;
Chandler v. *Von Roder,* 65 Id., 24 How., 224;
Thompson v. *Roberts,* Id., 233;
Avendano v. *Gay,* 75 U. S. (8 Wall), 376;
Wiggins v. *Burkham,* 77 Id. (10 Wall), 129;
Bethel v. *Mathews,* 80 Id., (13 Wall), 1;
Tilden v. *Blair,* 88 Id., (21 Wall), 241;
Argentine Mining Co. v. *Terrible Mining Co.,* 122 Id., 478;
Pierce v. *U. S.,* 160 Id., 355;
Ritter v. *M. L. I. Co.,* 169 Id., 139.

At page 53 and following of its brief, the plaintiff in error complains that the lower court erred in refusing to instruct the jury as to the effect of contributory negligence as laid down by the Roseberry compensation law, which, as we have already pointed out, is not in the case. It is conceded, however, that "we would " not expect this court to hold as a matter of law that " contributory negligence was proved" (p. 53): but if this be true, there was no occasion to charge on the subject of contributory negligence. But the plaintiff in error feels that "there was strong evidence in the " record of contributory negligence," and, "for the " purpose of showing the importance of the error of " the court in its instructions on this subject," reference is made on page 54, in a very slender way to some of the testimony. So far as Albano is concerned, his statement on pages 36-7 of the record was that the de-

ceased fell down; he fell down; he went off. Knight is unable to say just how Spina left the moving harvester (43, 48). Salapi tells us, at pages 50-51 of the Record, that the deceased was thrown off: again on page 51 he tells us Spino was thrown off; and finally on page 52 he reiterates that the deceased was thrown off the harvester. Wallis can, of course, contribute nothing in the way of testimony to the story of the events of July 1st: it is conceded in his testimony that he was not in the field at the time of the tragedy. He did say, however, at page 88 of the record, that the driver of the harvester "must watch his team": but this would necessitate the driver giving his attention to what was in front of him, and thus leave him in a position where he would be unable to protect himself against what was occurring behind him. The plaintiff in error makes Wallis say that "if a man falls from " the seat he will take the lines with him," and refers to page 89 of the record in support of this statement: but the record at this place does not support this statement, as it merely purports to reproduce the personal and individual experience of Wallis himself, "I always took them with me." In speaking on page 54 of the brief of Safford's testimony, plaintiff in error is constrained to admit that the straps referred to do not usually come with the harvester: but the statement is made "that Spino did not do so in this case"; and we respectfully direct attention to the fact that here, in its own brief, we find the plaintiff in error referring

to the deceased as "Spino," one of the two names that he was commonly known by. But the statement here made with reference to "Spino" is barren of authority, because the sole testimony upon the subject of the straps is contained in pages 94-5 of the record; and there Safford tells us, "I couldn't say whether the driver was tied in his seat or not." How it can be claimed that testimony of this kind supports the statement in the brief that "Spino did not do so in this case," we are quite unable to appreciate. On the same page, plaintiff in error undertakes to theorize as to what the deceased "probably" did: but we submit that what "Spino probably" did is shown by the testimony of Salapi: that is to say, "Spino" as the plaintiff in error calls him, was "thrown" from the harvester, as he might very well indeed have been, considering that "the seat has a tendency to whip about" (Safford, Record, p. 95), and considering also "the sharp turn to " the right" which Knight refers to on page 43 of the record. And finally, upon this point, plaintiff in error undertakes to say that "there is respectable authority " to the effect that in a case of this kind plaintiff must " affirmatively show that the decendent was free from " fault," and for this proposition *Gay* v. *Winter,* 34 Cal., 153, 164, is cited: but upon this proposition, we are quite content to rest upon the general doctrine of the Federal courts that in actions grounded on negligence, the plaintiff can rest on the presumption that he was without fault, until the contrary is shown by the

defendant (*Real Estate Trustees* v. *Hughes,* 172 Fed., 206). No doubt, any decision by the Supreme Court of California is a respectable authority: but as we have already pointed out, the rules concerning negligence are considered by the Federal courts to be matters of general law in which they are not concluded by individual state courts. We may add that on page 56 of the brief for plaintiff in error, it is suggested that the requested instruction was refused "under a misapprehension" as to the meaning of certain decisions, but we are unable to find the page of the record herein which justifies this statement.

The next complaint of plaintiff in error is to be found in assignment number XII:

But what relevancy this instruction had in the present cause, we must confess, that we are wholly unable to determine. The Amended Complaint in this cause exhibits an appeal to the courts for redress for the damage caused by the death of the deceased through the wrongful act of the defendant; and that appeal is made through the medium of an ordinary common law action for damages. Nowhere throughout the Amended Complaint, nowhere throughout the Answer to that complaint, is there the faintest suggestion, direct or indirect, that the present action is anything more or less than the ordinary common law action brought to recover damages for a death by wrongful act. This proceeding is so plainly not a proceeding "under the provisions of the so-called Roseberry com-

" pensation law of this State," either directly or indirectly, that we are wholly unable to perceive any rational ground upon which it could be expected that this instruction should be given. The instruction tells the jury that the plaintiff failed to prove certain matters "under the provisions of the so-called Roseberry " compensation act of this State": but the plaintiff below made no allegation, direct or indirect, of any matter or thing "under the provisions of the so-called " Roseberry compensation law of this State"; and the " so-called Roseberry compensation law of this State" was not "law applicable to the issues in said cause," to employ the language of assignment of error number XII. The Roseberry law was nowhere invoked by the plaintiff below, and was in no way relevant to any of the issues in the cause: this is simply an exhibition of the erection of a straw man for demolition purposes. But there is another reason why plaintiff in error has no just cause of complaint in this regard; and that is because the subject-matter of this instruction was substantially covered by the court below in the charge which it actually did give to the jury in the cause. There, in paragraph numbered III on page 115 of the record, the court makes it quite plain that since the plaintiff below did not rely upon any compensation law, he could not recover thereon; and the court there plainly told the jury that if the plaintiff had any redress under such laws, it must be sought by proceedings other than that at bar. So that, not only did the

instruction here referred to not fail correctly to state the law applicable to the issues in the cause, but it was in point of fact in substance given by the court to the jury in the charge actually delivered.

The next complaints of the plaintiff in error will be found in assignments of error, numbered XIII, XIV and XV; and we group these assignments of error together, because they are in a certain sense related. It will be observed that the instructions referred to in these assignments of error deal with the conduct of persons of ordinary prudence in their use of animals; and that the instruction referred to in assignment of error numbered XIV is tantamount to an admission that Twining and his horse and cart were such a means and instrumentality as was usual in the line of business of the defendant below. But the instructions here complained of were fully covered by the learned judge of the court below in his charge to the jury, and covered in a manner of which this plaintiff in error should be the last to complain. Not only is this subject-matter of the conduct of reasonably prudent men with regard to horses fully covered in the paragraph numbered V, on page 116 of the record, but also in paragraphs numbered VI and VIII, upon the same page. The paragraph numbered V was particularly favorable to the present plaintiff in error, and the same criticism is true of the paragraph numbered VI; and reading these two paragraphs together, we submit that they cover substantially the same matters which are

referred to in the assignments of error above mentioned. We think, moreover, that the mode in which this subject-matter was dealt with by the learned judge of the court below was much fairer to both sides, though leaning toward the defendant, than the instructions actually requested by the defendant below. For example, the instruction referred to in assignment of error number XV was really an argument by the defendant below, and was further infected by the vice of singling out for special emphasis a particular phase of the case. This species of instruction was condemned in *Rio Grande Ry.* v. *Leak,* 163 U. S., 280; and in *City, etc. Ry.* v. *Svedberg,* 194 Id., 201, wherein, on p. 204, Mr. Justice Harlan said that: "The court below was not bound to submit the case to "the jury in that way. It was not bound to make a "particular part of the evidence the subject of a spe- "cial instruction." This rule against singling out for special comment or emphasis, any special phase of a case, is condemned by such a multitude of state decisions that it would be the merest pedantry to attempt to cite them all: but the substance of those decisions is well reflected in the following remarks of Thompson in his monograph, entitled "Charging the Jury":

> "It is a pernicious error for the judge to single "out certain facts in evidence, and instruct the jury "with reference to those facts, while losing sight "of other material facts. Instructions ought not "only to be based upon the evidence, but upon all "the evidence. . . . The Judge may instruct

"the jury correctly and fairly in general terms, as "to the law of the case, so that, if he were to go "no further, the instructions would not be subject "to exception. But he may then entirely mislead "them by giving instructions which direct their at- "tention to prominent features in the testimony, "on one side of the case, while sinking out of view "or passing lightly over portions of the testimony "on the other side, which deserve equal attention.

"It is, therefore, a golden rule that the judge "who undertakes to present the evidence to the "jury must array before them all of the material "evidence on either side. He must not single out "isolated parts of the testimony, and instruct the "jury as to the law arising on the facts which testi- "mony tends to prove, and he must be careful not "to give undue prominence to certain portions of "it; especially, he ought not to review only those "facts which have a tendency to establish one side "of the case" (*Thompson, Charging the Jury,* pages 99, 101, 111).

And no better illustration, not merely of a singling out, but also of an argumentative singling out, could be desired than that contained in the instruction referred to in assignment number XV.

The next complaint of the plaintiff in error is to be found in assignments of error numbered XVI and XVII; and from the nature of the instructions referred to in these assignments of error, it will be convenient to consider them together. We think that the learned judge of the court below was entirely right in rejecting these instructions, for the reason, if for no other, that no instruction to a jury should be given which assumes, as a matter of fact, that which is not

conceded or established by uncontradicted proof (*Second Nat. Bank* v. *Hunt,* 78 U. S. (11 Wall), 391; *Washington etc. Railroad* v. *Gladmon,* 82 Id., (15 Wall), 401; *New Orleans Ins. Ass'n.* v. *Piggio,* 83 Id. (16 Wall), 378; *Lucas* v. *Brooks,* 85 Id. (18 Wall), 436; *Ind. Ry.* v. *Horst,* 93 Id., 291; *New Jersey etc. Co.* v. *Baker,* 94 Id., 610; *Knickerbocker etc. Co.* v. *Foley,* 105 Id., 350; *Snyder* v. *Rosenbaum,* 215 Id., 261, 265). But these requested instructions, deliberately assume the existence of a controverted fact, to-wit: "the negligence of the decedent." These instructions do not say to the jury, "If you find that the "decedent was negligent, and if you further find that "such negligence of the decedent was," etc.: if they had, other considerations would come into play; but they do not, and on the contrary baldly assume the negligence of the decedent,—a circumstance never conceded, and always contested. No fault on the part of the deceased has been exhibited anywhere in this record: he and Twining and Twining's horse were strangers: he was not employed upon the same instrumentality with Twining: his back was towards Twining; he was helpless to protect himself: he was neither expected nor required to keep what Mr. Justice Holmes calls "An impossible watch upon the rear" (*Vincent* v. *Norton etc. Ry.,* 180 Mass., 104, cited with approval in *O'Connor* v. *U. R. R.,* 168 Cal., 43, 47): even a deaf man is not required to maintain a constant watch upon the rear (*Furtado* v. *Bird,* 26 Cal.

App., 152: *O'Connor* v. *U. R. R.,* 168 Cal., 43): Spino was employed upon the harvester, and his sphere of activity was limited to the driving of his mule team, and he was entitled to rely upon the full performance of the master's duty to take proper precautions for his safety. He had, indeed, no voice in the employment of Twining, or in the selection of Twining's horse: he had no authority to govern or control Twining's management of his horse; and he was not only in a position where he could not well protect himself against negligence from behind, but he was in a position where he could have had no knowledge of the actions of Twining. In a word, there was no evidence in the cause of any contributory negligence by the deceased,—no evidence whatever: consequently no instruction on that topic was really necessary (for example, *Scott* v. *Seaboard Ry.,* 45 S. E. (S. Car.), 129): but even on the impossible hypothesis that there was, still, in order for negligence on the part of plaintiff to defeat recovery, there must be a proximate causal connection between the plaintiff's negligence, if any, and the injury: it must be such that but for this negligence the injury would not have happened: negligence, if any, on the part of the plaintiff, which in no way contributes to the injury would not prevent recovery (*Shaeffer* v. *Railroad,* 105 U. S., 249; *Ry. Co.* v. *Jones,* 95 Id., 439; *Terre Haute etc. Ry.* v. *Mannsberger,* 65 Fed., 196; *Lake Erie etc. Ry.* v. *Craig,* 73 Id., 642); and if, notwithstanding the negligence, if any, of the

plaintiff, the injury would have occurred, the defendant is liable,—the plaintiff's negligence, if any, is, in other words, no excuse if the defendant, by the use of ordinary care, could have avoided the injury (*Grand Trunk Ry.* v. *Ives,* 144 U. S., 408; *I. & S. C. Co.* v. *Tolson,* 139 Id., 551; *B. & O. Ry.* v. *Hellenthal,* 88 Fed., 116; and numerous other authorities to the same effect.

Not only are these requested instructions bad because of their bald assumption of the controverted fact of the negligence of the decedent, but they are wholly uncertain and misleading. For example, how was the jury to know what was meant by the phrase "the same "character or degree" as contained in the instruction referred to in assignment number 16, or the phrase "was equal to," which is found in the instruction referred to in assignment number XVII? Except for the purposes of misleading the jury, what value has either of these ambiguous and uncertain instructions? Moreover: Judge Thompson thus speaks of the thought which underlies the two requested instructions which we are considering: "This doctrine, which "visits upon the plaintiff or person injured, all the "consequences of the defendant's negligence, although "the plaintiff's negligence might have been slight and "trivial, and that of the defendant gross and wanton, "is cruel and wicked and shocks the ordinary sense of "justice of mankind. Such a rule finds no proper "place in an enlightened system of jurisprudence" (1

Thompson Negligence, sec. 170) ; and then, in note 8 to this section, the learned author remarks that "The "Supreme Court of Wisconsin still adheres to the "antiquated and unjuridical idea that negligence may "be divided into three degrees, slight, ordinary and "gross, and this has landed that court in the fantastic "conception that there can be no recovery where both "parties to the catastrophe were guilty of negligence "*in the same degree.*"

And again, the language of the learned Judge of the court below, in paragraph numbered 8 on pages 116, 117, and 118 of the Record, is such that the present plaintiff in error cannot have any reasonable ground for complaint because of the refusal to give the two instructions mentioned in assignments numbered XVI and XVII.

The next complaint of the plaintiff in error is contained in assignments numbered XVIII, XIX, XX and XXI. The instructions which form this group are objectionable upon several grounds. In the first place, they are not responsive to any issue in the cause: there was no such issue tendered as that of gross negligence: gross negligence was not in the case; and in the instruction referred to in assignment of error numbered XX, the plaintiff in error admits "that "plaintiff has not charged defendant with gross neg- "ligence." The instructions referred to in assignment of error XVIII, XIX and XX, are all open to

this objection: they are not relevant to the cause; and they deal with matters outside the issues. In *Chicago* v. *Robbins,* 67 U. S. (2 Black), 418, 429, a requested instruction was held properly rejected, because it did not arise out of the facts of the case, was inapplicable to them, was calculated to confuse and mislead the jury, and therefore should not have been given. And so, likewise, in *New York, etc. Co.* v. *Fraser,* 130 U. S., 611, it was said in the opinion that:

> "We do not deem it necessary to consider the "questions whether the instructions requested by "the defendant, as above set forth, and refused, "are correct, as abstract principles of law, with re- "gard to the general principles governing the "right of recoupment of damages. The bill of ex- "ceptions does not show any evidence tending to "prove all the facts which these instructions as- "sume to exist. . . . it would in our opinion "be error to give instructions applicable to evi- "dence not admitted. The legal principles in "those instructions as requested, were, so far as "they were founded upon the evidence substan- "tially put before the jury in the general charge of "the Court."

And, not to multiply authorities, in *Keyser* v. *Hitz,* 133 U. S., 138, it was held that instructions to the jury not based upon the evidence, or erroneously assuming the existence of evidence as to a special matter, are erroneous and should not be given.

But, over and above all this, these three instructions, like the two referred to in assignments numbered XV and XVII, involve "the antiquated and

"unjuridical idea that negligence may be divided "into three degrees, slight, ordinary and gross" (1 *Thompson Negligence,* sec. 170, n. 8),—an antiquated and unjuridical idea which has landed at least one court in a "fantastic conception of the law of negli- "gence." In some few jurisdictions, the civil law division of degrees of negligence is recognized, but in the great majority of jurisdictions, including the Federal Courts, it is rejected. In his great work on negligence, in section 18, Judge Thompson says:

> "I confess myself careless, ignorant and indif- "ferent upon this whole subject of the degrees of "negligence. It is plain that such refinements can "have no useful place in the practical adminis- "tration of justice. Negligence cannot be divided "into three compartments by mathematical lines. "Ordinary jurors, before whom, except in cases "in admiralty, actions grounded on negligence are "always tried, are quite incapable of understand- "ing such refinements."

And that these views are shared by federal judges, see:

The New World v. *King,* 57 U. S. (16 How), 469;
Milwaukee v. *Arms,* 91 Id., 489;
Purple v. *U. P. Ry.,* 114 Fed., 123;
Kelly v. *Malott,* 135 Id., 74.

And even in jurisdictions where negligence is distinguished into slight, ordinary and gross, it is not proper to instruct the jury as to what constitutes gross

negligence unless such fact is put in issue by the pleadings, and is supported by evidence,—which is only another way of saying that the Court in charging the jury should confine its instructions to the issues set forth in the pleadings, and that the instruction not so confined is improper although it may announce a correct proposition of law.

Bertleson v. *Chicago Ry.,* 40 N. W. (Dak.), 531;
Cincinnati Co. v. *Lewallen,* 32 S. W. (Ky.), 598;
Chicago Ry. v. *Scates,* 90 Ill., 586;
Louisville Ry. v. *Law,* 21 S. W. (Ky.), 648;
Moss v. *North Carolina Ry.,* 29 S. E. (N. C.), 410.

Upon all these grounds, therefore, we respectfully submit that the present plaintiff in error has no real cause for complaint against the action of the learned Judge of the court below, whose charge taken as a whole, fully and fairly covered the issues in the cause.

The instruction referred to in assignment of error number XXI, is bad, moreover, for the reason that it assumes a fact which was and is a controverted fact in the cause, viz: negligence of the decedent. We have already had something to say concerning this vice of assuming controverted facts in this way, and the authorities there cited are fully as applicable here.

The plaintiff in error next complains of the refusal

of the Court to give the instruction set out in assignment of error number XXII. In that instruction the jury are told that the assertion of the defense of contributory negligence is not to be taken as an admission of negligence, or as any evidence of negligence on behalf of the defendant. But as we have already seen, there is very respectable authority to support the proposition that this instruction is not good law. In the next place, the jury was very pointedly and carefully instructed that the burden of proving negligence is upon the party asserting such negligence; that before the plaintiff could recover the jury must not only find from a preponderance of all the evidence that the defendant was negligent, but also that such negligence was the proximate cause of the injury, and that the plaintiff was guilty of no negligence, however slight, contributing thereto; and that the plaintiff must show that the defendant was guilty of negligence, and that such negligence was the cause of the death of the decedent; and that if the death was accidental, and not caused by any negligent act of the defendant, the plaintiff cannot recover. And the jury were further very fully instructed concerning their province to determine the facts of the case: they were told that they could not consider as evidence statements of counsel unless made as an admission or stipulation conceding the existence of a fact: that they were not to consider as evidence or law any argument, comment or suggestion made by counsel: that they were not to consider

for any purpose any evidence offered and rejected, or which was stricken out by the court; and they were plainly told that they were "to decide this case solely " upon the evidence that has been introduced before " you, and the inferences which you may deduce there- " from, and such presumptions as the law may deduce " therefrom, as stated in these instructions, and upon " the law as given you in these instructions." In view of these instructions, and in view of the limitations which they impressed upon the function of the jury in deciding the facts, and in view also of the absence of any intimation by the Court that the pleading of contributory negligence could be taken as an admission of negligence or as evidence of negligence, it is extremely difficult for us to imagine what ground of complaint the plaintiff in error really has in this behalf. If the Court had actually instructed the jury that the fact that the defendant below pleaded the contributory negligence of the decedent could be taken by the jury as presupposing negligence on the part of the defendant, and was therefore evidentiary of such negligence,—if the lower court had actually instructed the jury that a defense of contributory negligence was really one of confession and avoidance,—we should have been prepared, upon the authorities heretofore cited, to defend such an instruction: but the lower court did not so instruct the jury, nor did the lower court even remotely intimate anything of that kind; on the contrary, the lower court clearly explained to

the jury that they were to decide the case solely upon the evidence that was introduced before them, and the inferences therefrom, within the lines laid down in the Court's instructions. Moreover, an instruction of the character referred to in assignment of error number XXII should not have been given to the jury in any event: first, because it was too general and calculated to mislead them; in the next place because it was purely argumentative; and in the next place because there was no foundation anywhere in the cause upon which such an instruction could be predicated,—that is to say, there was no evidence whatever in the cause of any contributory negligence whatever on the part of the deceased. We have already to some considerable extent discussed this matter of contributory negligence, and the suggestions there made need not here be repeated: we submit that from the beginning to the end of this trial not a scrap of evidence was presented upon either side to establish any contributory negligence whatever by the deceased; and under such circumstances, no basis for such an instruction can be discovered. Courts are not required to instruct juries upon a supposed, conjectural or hypothetical state of facts of which no evidence appears in the record (*U. S.* v. *Breitling,* 61 U. S. (20 How.), 252; *Chicago etc. Ry.* v. *Houston,* 95 Id., 697; *Haynes* v. *McLaughlin,* 135 Id., 584; *Wellington Min. Co.* v. *Fulton,* 205 Id., 60). We have already pointed out that instructions which are not based upon evidence in the

record, or which have no evidence to support them, should not be given; and when the lower court in this cause instructed the jury that the plaintiff could not recover if the evidence showed that the deceased was guilty of contributory negligence, however slight, contributing proximately to his death, we think that it fully discharged its duty in the premises, and gave to the plaintiff in error everything which it had any right to expect; and a request for an instruction to the jury which blends questions of admissibility of evidence with those pertaining to its sufficiency, should always be denied (*Columbian Ins. Co.* v. *Lawrence,* 27 U. S. (2 Peters), 25).

The next complaint of the plaintiff in error is contained in assignment of error number XXIII, which deals with the subject-matter of damages. The court very fully charged the jury as to the rule of damages in cases of this class, in paragraph 11 of the charge; and as we have seen, the court was under no obligation to adopt the phraseology of counsel upon this subject. The complaint made in this assignment of error is not that the court did not instruct the jury, as to the rule of damages, or that what he said was wrong, but merely that this particular instruction was not given: but if the court fairly advised the jury as to the rule of damages in cases of this class, it did its full duty, and the plaintiff in error has no ground for complaint. It will, of course, be remembered that in this jurisdiction, the rule of damages is fixed by statute; and

under section 377 of the Code of Civil Procedure of the State of California, when the death of a person not being a minor is caused by the wrongful act or neglect of another, either his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person: and in every such action, such damages may be given as under all the circumstances of the case may be just. This statute has been the subject of discussion and interpretation by the Supreme Court of California; and the instruction which the learned judge of the court below gave to the jury in this cause was based upon this statute and the decisions construing it, including *Crabbe* v. *Mammoth Mining Co.,* 168 Cal., 500. The decisions of the highest state court under the statute giving a right of action for death by wrongful act, are binding upon the federal courts and this doctrine has been specifically declared with respect to the question of damages (*Quinette* v. *Bisso,* 136 Fed., 825, *certiorari* denied in 199 U. S., 606; *Louisville, etc. Ry. Co.* v. *Lansford,* 102 Fed., 62: *Jacobs* v. *Glucose Sugar Refining Co.,* 140 Id., 766); and in a case, in which the jury were distinctly informed that they were to follow the rule of damages announced by the state court in an action to recover damages for the death of the plaintiff's testator, caused by the wrongful act and omission by the defendant, the Supreme Court affirmed

the judgment, and held that the action of the lower court in respect of this matter was not ground of error (*Roseville etc. Ry.* v. *Clark,* 152 U. S., 230; and see also, *Hastings Lumber Co.* v. *Garland,* 115 Fed., 19; *S. P. Co.* v. *Hall,* 100 Id., 765). The learned judge of the court below was therefore quite correct in the instruction which he gave to the jury on this subject: it fully, fairly and correctly stated the law applicable to the subject-matter; and the plaintiff in error has no reasonable ground for complaint in this behalf. It may be added that where no error of law appears, the verdict is conclusive in respect of the amount of damages.

S. P. Co. v. *Maloney,* 136 Fed., 171;
Ill. Central Ry. v. *Davies,* 146 Id., 247;
Nelson v. *Bank,* 156 Id., 161.

The foregoing observations, we respectfully submit, sufficiently dispose of what plaintiff in error has to say on pages 57-8 of its brief on the subject-matter of damages. That the defendant below is dissatisfied with the amount of damages awarded, that it is the province of the jury to assess the damages in cases of this class, that their verdict will not be set aside simply because it is excessive (if it be so) in the mind of the court, but only when such excess is shocking to sound judgment and fariness (*Paauhau S. P. Co.* v. *Palapala,* 127 Fed., 920, 928-9: not a death case), and that even where the verdict is considered excessive,

a remission of a part of the damages may be directed, are all rules so thoroughly understood that we do not consider it necessary to cite authorities in support of them.

The next complaint of the plaintiff in error is contained in assignments of error numbered XXIV and XXV, the first of these dealing with the action of the lower court in denying the motion of the defendant below for a nonsuit, and the second of these dealing with the action of the lower court in denying the motion of the defendant below to instruct the jury to render a verdict in favor of the defendant and against the plaintiff. We have had occasion already to refer in an earlier portion of this brief to these assignments of error, and there set forth the grounds and the authorities upon which, in our opinion, these assignments of error were bad and should not be considered by this court. We wish to add to what was there suggested the statement, which the record here fully supports, that any exception to the action of the lower court in either of the respects mentioned was waived when the defendant below introduced evidence upon its own behalf. This, we think, of itself, would be a perfect answer to these two assignments of error: the rule is thoroughly established in the federal courts that a defendant's exception to the denial of a motion for a nonsuit, or of a motion for the direction of the verdict is waived by the offer or introduction of testimony or evidence in support of the defense (*Silsby*

v. *Foote,* 55 U. S. (14 How.), 218; *N. P. Ry.* v. *Mears,* 123 Id., 710; *Union Ins. Co.* v. *Smith,* 124 Id., 405; *Bogk* v. *Gassert,* 149 Id., 17; *Wilson* v. *Stock Co.,* 153 Id., 39; *Runkle* v. *Burnham,* Id., 216; *Hanson* v. *Boyd,* 161 Id., 397; *McCabe Const. Co.* v. *Wilson,* 209 Id., 275).

The XXVIth assignment of error formulates the complaint of plaintiff in error that the evidence is insufficient to justify the verdict. Certain particulars are set forth in which it is claimed that the evidence is insufficient to justify the verdict: there are eighteen of these particulars; but no one of them attempts or purports to specify wherein or how or why the evidence is insufficient to justify any finding of the jury; and all that we are confronted with is the undraped assertion that the evidence is insufficient to justify this, that or the other finding. Independently, however, of the generality and indefiniteness of these so-called particulars, we think that the complaint here made is wholly unjustified by the state of the record. It will be convenient to consider together the first, second and eighteenth of these alleged particulars, which deal with the subject-matter of parties, so to speak. We submit that these particulars are not justified by the record in this cause. The entire course of decision in the State of California under section 377 of the Code of Civil Procedure, from *Monroe* v. *Dredging Co.,* 84 Cal., 515, through *Ruiz* v. *Santa Barbara Gas Co.,* 164 Cal., 188, and down to *Crabbe* v. *Mammoth Mining*

Co., 168 Cal., 500, makes it clear that an action of this character could not be brought except on behalf of the estate or heirs of the deceased; who are "the real parties in interest" (Brief of Plaintiff in Error, p. 50), and for whose sole benefit the action is brought, the money recovered being no part of the estate of the deceased (*Ruiz* v. *S. B. Gas Co., supra*); and when the jury in this cause, after listening to the probate record (Record, p. 55-84), and after listening to the testimony of the widow of the deceased (Record, p. 85) found a verdict in favor of the plaintiff, this question was settled. The claim that the evidence was insufficient to justify a finding that the plaintiff prosecutes the action for or on behalf of the wife or minor daughter of the decedent (assignment XXVI, particular 18), is covered by the suggestions which we have just made; and the claim made in particular number 2 to the effect that the evidence is insufficient to show that Spina left any heirs, or that he left the wife and child referred to in the Amended Complaint herein, is fully met, not only by the testimony of the widow, not only by the failure of the defendant below to assign any such ground upon its motion for a nonsuit, not only by the uncontested assertion of plaintiff's counsel in the colloquy with the court on pages 84 and 103-4 of the record, but also by the utter and complete absence of any contradiction, contest or controversy upon these points during the trial below. The widow testified plainly that she and the deceased were married in Italy

some thirteen years prior to the time of her testimony: that he was 36 years old, while she was 31 years old; that he supported her during his lifetime: that she recently came from Italy to California; and that she had one child, Assunta, who would be 10 years old on the 15th of August, 1915. This testimony is not only uncontradicted, but was given under the following circumstances:

> "THE COURT—And any children in the case?
> "MR. DUNNE—Yes, sir. I propose to call the widow now and prove those facts by her.
> "MR. TREADWELL—She testified before. I am perfectly willing to let her testimony go in as it is.
> "MR. DUNNE—That will save the necessity of calling her. By consent of counsel, I will read in evidence to you gentlemen, the testimony of the widow, as given upon the former trial which reads as follows" (Record, p. 84).

Upon the whole we therefore respectfully submit that the complaint made as to these three particulars numbers 1, 2 and 18, is not well founded.

The next particulars to attract attention are those numbered 3, 14 and 16. These so-called particulars are extremely general and indefinite in character: they wholly fail to specify wherein, or how, or why in the directions mentioned, the evidence is insufficient to justify the findings of the jury; and all that they amount to is a general declaration that the evidence is insufficient to justify the finding that the deceased came to his death through the negligence of the de-

fendant. Such a statement as this, we submit, is entirely too vague and general to be considered. We have already discussed the rules pertinent to matters of this kind, and in the light of those rules have to some considerable extent reviewed the facts in the case as developed on the trial; and we submit that the only fair conclusion to be drawn therefrom is that the deceased came to his death through the negligence of the defendant, that the cause of action sued upon is based upon that negligence, and that in that negligence Twining and his high-lifed, spirited horse, which needed attention, was the prominent factor. There can be no doubt upon the admissions in the pleadings and the proof upon the trial that Twining and his horse and cart was an instrumentality of the defendant regularly employed in its business for the purpose of keeping a record of the products of its grain fields, and that in the course of that employment, Twining used a horse which was furnished him by the defendant below; and since negligence is the inference or conclusion which practical judgment draws from a number of constitutive facts, and since the record in this cause contains the constitutive facts from which that inference may be drawn, it follows that it cannot be said that the verdict of the jury was unsupported by evidence, or that the evidence was insufficient to justify the finding of negligence.

The particulars numbered 4, 5 and 15 may be considered together, because of their dealing with the

same subject-matter. We have already quite fully discussed the condition of the evidence relative to this subject-matter and have pointed out with clearness, we hope, that there was evidence before the jury from which it could have found that the horse was fractious, frisky, not easily controlled, liable to run away, dangerous because of capacity to frighten, or a dangerous animal with which to approach an easily frightened harvester team. We think that a fair reading of the record in the cause will satisfy any candid person that these particulars of this assignment of error are not entitled to serious consideration.

Plaintiff in error, at p. 19-21 of its brief, refers to the testimony of Wallis, Safford, McSwain, Knight and Salapi: the first three of these were defendant's witnesses, while the last two were produced by the plaintiff who had the verdict: great prominence and precedence are accorded the witnesses whose theories the jury rejected, while but scant notice is taken of those upon whose testimony the jury founded its verdict; and while 12 lines of space are devoted to Wallis, and 12 lines to Safford, and 17 to McSwain, yet but a shade over 3 are given to Knight, and but 2½ to Salapi. But the undue prominence thus given to the three witnesses for the side against which the jury decided, cannot conceal the inherent weakness of their testimony, or impeach the good judgment of the jury in rejecting their views: their testimony was quite negative: Wallis "never heard of its (the horse) being

"vicious" (Brief, p. 19)—neither did the Emperor of Japan: Safford "never knew of its being vicious or "unmanageable or anything of that kind" (Brief, p. 20)—neither did the Governor of North Carolina: McSwain "never knew anything vicious or unmanage-" able about the horse" (Brief, 20)—neither did General Joffre; and of what value is alleged testimony of this kind? Wallis, the Superintendent, really knew nothing about the horse, "because we have so many "horses" (Record, 88): Safford, another employee of defendant, can only "suppose it is the same horse" (Record, 92), "I do not know how well bred she was" (*Id.*, 93), "I don't remember ever using the horse my-" self" (*Id.*), "there are lots of horses on the farm, and "I don't remember ever driving this one" (*Id.*); and McSwain, who knew the horse six months (Record, 97), after conceding the horse to be "high-life," expresses the dubious opinion that *"I don't think* she "would run away" (*Id.*), although "of course to start with, she shied a little bit, it didn't amount to any-"thing" (*Id.*). We submit that testimony of this type is of no value, and the jury rightly declined to be influenced by it: ordinarily a witness like Knight or Salapi who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten: "the testimony in "the one case is positive, in the other case it is nega-" tive, and both statements may be true"; and not only does this negative testimony fail to qualify the affirma-

tive testimony of Wallis that the horse was "good life" and of McSwain that it was "high life," not only does it fail to meet the affirmative testimony of Knight and Salapi, but it also fails to meet their accepted testimony as to the exciting conduct of the horse while being driven towards the harvester just before the death (*Stitt* v. *Huidekopers,* 84 U. S. (17 Wall.) 384, 394: *Aetna L. I. Co.* v. *Ward,* 140 *Id.* 76: *Paauhau S. P. Co.* v. *Palapala,* 127 Fed., 920, 925: *Aetna L. I. Co.* v. *Davey,* 40 *Id.,* 911: *Chicago, etc., Ry.* v. *Andrews,* 130 *Id.,* 65: *Del., etc., Ry.* v. *Devore,* 122 *Id.,* 995: *B. & O. Ry.* v. *Baldwin,* 144 *Id.,* 53: *The Fin MacCool,* 147 *Id.,* 123).

The particulars numbered from 6 to 12, inclusive, may likewise be considered together, because they deal with the conduct of Twining. This subject-matter has likewise been heretofore very fully discussed, and that discussion need not be repeated. We wish, however, respectfully to insist that Twining and his horse and cart was a constituent element in the place where the deceased was required to do his work; and we respectfully insist that this boy of 16½ years, and his horse and cart, were an instrumentality for the conduct of the defendant's operations. The following references to the record will serve, we think, to make this clear:

Amended Complaint, paragraph IV: Record page 20, line 26, to page 21, line 12.

Albano: Record page 36, lines 7-8.

Id. page 37, lines 3-5.
Knight: Record page 44, lines 12-16.
Salapi: Record page 54, line 22, to page 55, line 1.
Twining: Record page 99, lines 7-15.

It is thus plain that Twining was an instrumentality of the defendant's business, and an instrumentality which was part and parcel of the place and situation in which the decedent was compelled to do his work.

Singer Mfg. Co. v. *Rahn,* 132 U. S., 518;
Nooney v. *Pacific Express Co.,* 208 Fed., 274.

In its brief, between pages 21 and 30, plaintiff in error advances the proposition that "there was no evidence that Twining was negligent in the handling or control of the horse,"—a contention which, we submit, is fully answered by our review of the facts. In this connection, reference is made to *Rowe* v. *Such,* 134 Cal., 573, but we shall have something to say of that case when we discuss the authorities cited by plaintiff in error. The suggestion is also made at p. 22 "that Twining did everything possible to control the horse"; and after quoting a portion of Albano's testimony, the claim is made that Twining "had such "control of the lines that *when the horse started to* "*run,* and before it got past the machine, he was "holding the horse pretty strong, with his arms ex- "tended their full length" (page 23). But this claim cannot endure analysis. No warrant can be found in

Albano's testimony for any claim that Twining had any control of the lines whatever "when the horse started to run": on the contrary, Albano plainly declares, "I did not notice when the horse and cart first began to run—not when they started" (Record, p. 37). Nor can any justification for this claim be found in the testimony of Knight, because he plainly tells us, at p. 48 of the Record, "I did not see Mr. "Twining or his horse at the time that it started to "run, and I don't know what it was started Mr. "Twining's horse to run. His horse started the team "to run." That Twining was in the cart both before and after "the horse started to run" is apparent in the testimony: but whether "when the horse started to run," he "had such control" as is claimed here, cannot be determined from the testimony of either Albano or Knight. What Twining's conduct was "when the horse started to run" is established by the testimony of Salapi,—testimony supported by every fact and fair inference in the case, corroborated in many material particulars even by Twining, and accepted by the jury that rejected Twining's version. Of what utility, then, to refer to those portions of the testimony of Albano and Salapi as to what Twining was doing *after* the horse had commenced to run? What Twining was doing or trying to do, *after* the horse had started to run, throws but very little light upon the facts and circumstances constitutive of the starting to run itself; and indeed, the only inference

to be drawn from Twining's conduct, after the horse had started to run, was that he was endeavoring to hold the horse, because of his consciousness that he had done a most negligent thing in permitting the horse to start to run. At the time when Albano and Salapi saw Twining with his arms outstretched holding the horse, the horse had already started to run: the starting to run was already an accomplished fact, and past history; and this may be illustrated by the testimony of Albano, on cross-examination, where he stated, "I did not notice when the horse and cart first began to run—not when they started."

In other words, the duty of Twining to exercise care in the management of his horse and cart was not limited to the exact instant of danger to the person of another, without reference to whether Twining observed care before that instant to avoid injuring such other: on the contrary, it was Twining's duty, reasonably, and in due time, to observe precautions to avoid injuring any other person in the field: it was his duty to be on the alert to avoid danger; and he should not have delayed taking precautions until too late to avoid injury. Twining's efforts to restrain the horse, if he made any efforts to restrain the animal, made after the horse had started to run, were what judges and text-writers call efforts *in extremis* and therefore useless: the real duty of Twining was not so much to seek to restrain the horse after the horse had started to run away, but to have originally pre-

vented the horse from running away at all. And therefore, the testimony of Albano, as quoted in defendant's brief, does not touch the question as to whether Twining was or was not careless in originally permitting the horse to start to run.

At p. 27 of its Brief, plaintiff in error, speaking of the testimony of Salapi, uses the phrase "taking this testimony at its face value, and disregarding any conflict between it and his previous testimony": but as to this observation we have but brief remarks to make. In the first place, there was no conflict whatever between his testimony as given upon the two trials: the testimony on the second trial was naturally more full than on the first, but there was no conflict. In the second place, if there was any conflict in his testimony, it was for the jury to resolve that conflict, and this they did in favor of the plaintiff below. And in the third place, as the learned judge told the jury below, they were "the sole judges of the effect and value of the evidence" (Record, 120); and the jury believed Salapi and disbelieved Twining in all particulars where Twining differed from Salapi, and found for the plaintiff.

Great prominence is then given on pages 28-9 to the testimony of the witness whose version the jury declined to accept; and at the top of p. 30, the astonishing statement is made that "it will be seen "that this version of the matter is not materially "different from the combined version of the other

"witnesses." We respectfully submit that a critical analysis of the testimony will establish that upon many features of the case a most material difference exists; and in this regard we need not refer to more than the unnecessary excitement into which the high-lifed, spirited animal that needed attention was plunged while zigzagging across the field, or the loosely hanging reins, or the distraction of attention from the horse in front to Trainor at the side, or the talk and gesticulation, or other aspects of the situation that will readily suggest themselves.

Particular numbered 13 deals with the claim that the evidence is insufficient to justify the finding that the defendant negligently failed to supply the decedent with a safe place to work: but there was evidence before the jury sufficient to justify them in finding that the defendant negligently failed to supply the decedent with a safe place to work. If the claim be that the harvester was a standard harvester, equipped with brakes and a crew, that the harvester team could be controlled with the lines, and that it was impossible for the team to run any great distance if the brakes were set, then we beg leave to point out that this alleged impossibility is a purely theoretical impossibility which is fully answered by the concrete facts proven in this cause as to the distance which the mule team actually did run upon being frightened: if the brakes were set, these facts show that the brakes were wholly inefficient to pre-

vent the runaway; and if the brakes were not set, then the harvester was unsafe for another reason—because inefficiently manned and handled. It is not entirely clear that the driver could assert any control over any brake sufficient of itself to stop the harvester under such circumstances as are delineated in this cause: but even though such were the fact, still we know that Trainor, the sack sewer, at the time when the runaway started, was not in any position where he could handle any brake,—a condition of things in which the deceased had no voice, and over which he had no control. The safe place to work rule applies to the instrumentalities with which the work is done and the immediate surroundings of the work (*Myers* v. *Pittsburg Coal Co.,* 233 U. S., 184; *Choctaw, etc. Ry.* v. *McDade,* 191 Id., 64; *N. P. Ry.* v. *Peterson,* 162 Id., 346; *U. P. Ry.* v. *O'Brien,* 161 Id., 451); and where the mode of doing the work is careless, the place is not a safe place to work (*Hennessy* v. *Bingham,* 125 Cal., 627): in the case last cited, the Supreme Court of California used this language:

> "If the employer has failed to use ordinary care
> " in the mode of doing the work, and, therefore,
> " injury has resulted, he has failed to provide a
> " safe place for the workingmen to do their work,
> " and has subjected them to unusual risks, which
> " they did not assume by accepting the employ-
> " ment, unless they knew of the unusual risks. In
> " such case the neglect of the employer in respect
> " to duties which he cannot avoid by putting them
> " upon a co-employee, has contributed to the in-
> " jury, and he is responsible."

We have already pointed out that Twining and his horse and cart were an instrumentality for the conduct of the defendant's operations; and in that behalf, we have referred to the record and to the authorities supporting that proposition; and we have pointed out that this instrumentality was a part and parcel of the place and situation in which the decedent was compelled to do his work: but, if there were nothing more to be said, the negligent conduct of the defendant in sending this inexperienced slip of a boy, in charge of a strange, unfamiliar, high-lifed, spirited animal, which needed attention, into dangerous proximity to an easily frightened mule team, and the careless conduct of that boy in letting the lines slip while his attention was distracted from the horse to Trainor, after he had stirred up this spirited animal by running or galloping and zig-zags and circles, made that place the death trap that was disclosed by the subsequent events; and it would be no answer to this claim to urge that at other and prior times, the harvester had been operated by the driver without accident,—"that circumstance is only "a matter of wonderment, and is an instance of how "long good luck will sometimes protect carelessness "for long periods" (*Monahan* v. *Pac. Rolling Mill,* 81 Cal., 190, 193; *Hennessy* v. *Bingham,* 125 Cal., 627, 633: the *Nordfarer,* 115 Fed., 416). Whether this harvester was a standard harvester, whether it was a usual or customary harvester, by no means

exhausts the situation in the midst of which Spino was placed with his back turned to the source and origin of the disastrous consequences which followed: because, whether this harvester was a usual or customary harvester or not, neither this defendant nor any other person can hide behind what is usual or customary in an effort to evade the duty cast upon it by law to adopt and maintain reasonable and proper precautions to furnish its employees with a safe place in which to do their work. We do not understand that a custom or usage can be invoked to justify a negligent act: we think that such evidence would be an attempt to excuse the defendant's negligence by showing a custom to be equally negligent. But nowhere in this record can any credible evidence be found to establish the proposition that whether a harvester, considered purely *qua* harvester, be a usual harvester or not, it is either usual or customary to commit a strange and spirited animal to the custody of an inexperienced stripling, and then send that stripling with that unfamiliar and high-lifed animal into an unfamiliar locality that he had visited only once before, and into dangerous proximity with an easily frightened mule team; and we think that if this sort of thing be usual or customary, then the quicker those engaged in such occupations alter their customs, the better it will be for them, and the greater the protection which will be afforded to the lives and limbs of innocent men.

Why, in other words, raise a false issue about every other element making up the existing situation, except the real vital one? Why argue, for example, about the harvester being all right, and its crew all right, and these mules all right, but overlook this further constituent instrumentality and ignore the conduct of the defendant in sending that boy out there to that field under the circumstances disclosed? Why set up this straw man merely to knock him down again? No evidence was produced by the plaintiff to the effect that the harvester and crew were not all right: nor did the plaintiff claim that President Wilson was not concerned with European and Mexican troubles: but what have these things to do with the special questions here? Were not those mules liable to fright? Was not that horse a strange animal to Twining, of whose disposition the boy was ignorant, and which he was then using for the first time? Was not that cart a little two-wheeled thing without brakes? Was not Twining a mere slip of a boy?

We say that those mules were liable to fright; and we are told, if you please, that this harvester was a usual model. We say that Twining's horse was a strange and unfamiliar animal to him, which he should have taken no chances with; and we are told, if you please, that the harvester crew was all right. We say that the cart was a little two-wheeled thing without brakes; and we are told, if you please, that the driver of the harvester is provided with a place

to support his feet. We say that Twining was a heedless boy; and we are told, if you please, that the harvester was fitted with brakes. We say that Twining and his horse and cart were a glaring menace to the lives of the men upon that harvester; and we are told, if you please, that Peter Piper picked a peck of pickled peppers. In a word, it is our claim, and the jury approved it, that Twining and his horse and cart were not all right, and that this particular instrumentality of the defendant's business was not handled with that care and prudence which would be suggested by the slightest conscious obligation to avoid injury or death to one's fellowman.

The last of these alleged particulars included within assignment number XXVI, is that the evidence is insufficient to justify a finding that by reason of the negligence of the defendant, the plaintiff has been damaged in the sum of $5000, or any sum. But this alleged particular, likewise, will not withstand analysis. The record shows that at the time of his death, Spina was a comparatively young man: he was only 36 years of age; and his expectancy of life was 31 years and 7/100. His wife was then a woman 31 years of age and her expectancy of life was 34 years and 63/100 (pp. 84-5). The proof shows that at the time of his death, Spina was earning "$3.00 a day and his board, working 26 days a month" (record, p. 39): in other words, he was earning $78 per month and his board. It appears from the testimony of the

widow, at page 85 of the record, that she was dependent upon her husband's earnings for her support: she tells us that her husband supported her during his lifetime, and she adds, "just all I got was just whatever my husband used to send me" (record, p. 85). And obviously by this tragedy her sole source of support was taken from her and she and the child were left quite penniless. For this bereavement, we believe that she is entitled to compensation: The underlying principle is that where one person derives pecuniary benefit from the continued life of another, the untimely termination of that life presumes pecuniary injury (6 *Thompson, negligence,* sec. 7050); and we submit that the amount at which the jury estimated the damages is an amount which, while on the one hand it was not vindictive, still on the other hand, it was just and righteous in view of a full and fair consideration of all of the circumstances of this case. Under our statute, the jury in cases of this class, may give such damages as under all of the circumstances of the case may be just (*C. C. P.,* sec. 377), and we think that this course was pursued in the cause at bar.

The last of these alleged "particulars" is the general objection that the jury returned a verdict in favor of plaintiff: no claim is made in this assignment of error No. 27, that this verdict was "then and there" duly excepted to: on the contrary, the statement is that the verdict was "thereafter" duly excepted to;

and the fact is, as shown by the bill of exceptions (Record, p. 131) that the verdict of the jury was not at all excepted to at the time. Consistently with our contention heretofore made, we repeat that an assignment of error cannot be utilized for the purpose of supplying deficiencies in the record below, or for the purpose of importing into the case some new matter or some additional exception.

AUTHORITIES CITED BY PLAINTIFF IN ERROR.

The authorities cited by plaintiff in error on pages 30-35 of its brief are not relevant to the special facts and circumstances of this particular case.

Reference is made to *Rowe* v. *Such*, 134 Cal., 573, and the opinion of Judge Farrington in the cause at bar, filed July 13, 1914. But the most which can be extracted from *Rowe* v. *Such* is that the naked fact of a runaway, in and of itself, standing alone, and uncomplicated by any other fact or circumstance, does not raise a presumption of negligence. And in considering the value or lack of value of *Rowe* v. *Such* as an authority in a cause presenting such features as are presented by the cause at bar, it is proper to point out that the courts of the United States are not controlled, upon questions of negligence, by the views entertained by any particular state. Questions relating to negligence causing personal injuries, are, in the absence of statute, usually regarded as questions of general law as to which the federal courts are

not concluded by the decisions of the state courts; and it is needless to add that in the State of California, no statute has been enacted governing this subject-matter of runaway horses. Questions relating to negligence, except as qualified by an actual statute, are regarded as questions of general law as to which the federal courts will follow their own independent judgment, irrespective of the decision of the state court. This rule has been applied, for example, to the duty to furnish proper appliances (*Gardner* v. *Michigan Ry.,* 150 U. S., 349), to the doctrine of *res ipsa loquitur* (*Montbriend* v. *Chicago etc. Ry.,* 191 Fed., 988) to negligence in relation to minor employes (*Force* v. *Standard Silk Co.,* 160 Fed., 992, 179 Fed., 184), to the delegation of duties (*Hough* v. *T. & P. Ry.,* 100 U. S., 213, 225), to the duty to employ competent co-workers (*Wabash Ry.* v. *McDaniels,* 107 U. S., 454); and generally, to other aspects of the law of negligence. The illustrations given will suffice, we hope, to illustrate a rule about which there can be no dispute.

In view of this rule, this court is not bound by the ruling of the Supreme Court of the State in *Rowe* v. *Such,* 134 Cal., 573, limited as the scope of that case is, but this court is free to apply to the facts and circumstances, in evidence here, its own conceptions of the correct legal rule to be applied. And if this court should feel that the instrumentality in question was under the exclusive control of Twining, and that

horses do not, in the ordinary course of things, run away without some inattention or carelessness on the part of those supposed to be in control of them, and that if Twining had been reasonably careful in his management of the animal to retain over it, when alongside the harvester, the proper control, and that these considerations authorized an inference of negligence calling for explanation by the defendant, there is nothing whatever in any state court decision to prohibit this court from taking that view.

But between *Rowe* v. *Such* and the cause at bar, upon the facts, the widest divergencies exist. That was an action by an executrix to recover for the death of the testator caused from being struck by a wagon drawn by a runaway horse. The transaction occurred in Van Ness Avenue, one of the streets of the City of San Francisco. There was more than one defendant in the action; and the claim of the appellant was that she had made out a *prima facie* case against the defendant, Nelson, under whose management and control the wagon had been driven by his driver, Baumert, prior to the accident. In that case, it was conceded that the horse ran away because of some unexplained cause: as remarked by the court: *"there is absolutely no evidence pointing to negligence on the part of the driver.* When he was first seen he was in the air and falling from his seat to the ground. *Whether he lost control of his horse through negligence is not shown, nor does any fact appear*

from which negligence could be inferred" (page 575). It would appear from the report that, so far as the *res gestae* were concerned, there were but two witnesses whose attention was attracted by some one crying out, and who, on looking in the direction of the cry, saw the wagon coming. One of these witnesses testified that the driver was in the air and sat down on the ground, the horse ran away and the man jumped up and ran after him. He said that the horse was going toward Van Ness, the driver fell off or got off opposite the door of an armory in Ellis Street. This witness testified that the driver was in the air when he saw him between the seat and the ground: he was off the seat: the horse was not going very fast then: the driver ran after the horse: the horse then ran: by that time the reins were dangling around the horse's feet: the horse then ran so fast that he did not want to try to stop him. It appears that the horse while in Van Ness Avenue collided with the deceased, who was so severely hurt that he died shortly afterward. There was no claim that there was any contributory negligence on the part of the deceased. This appears to be the whole of the case of *Rowe* v. *Such.*

From all that appears from the report of *Rowe* v. *Such,* the incident there related may very well have been an isolated incident in the life of the driver in question. There was no fact in that case "from which negligence could be inferred." The report discloses

nothing about the youth or age of the driver of the wagon; nor does it exhibit any previous warning to or reprimand of that driver, because of his careless method. In the case at bar, we are not only confronted by the driver who was a mere youth, not shown to have been experienced in the management of animals, but we are also confronted by a driver whose heedlessness at a prior occurrence furnished the occasion through which the proof was made of notice to the master of the extreme danger of approaching a mule team from the rear. There was nothing in *Rowe* v. *Such,* to show that the horse there driven was a different and strange animal substituted for the animal in use antecedently: but in the cause at bar we have the fact that this youthful driver, not shown to be skilled in the management of animals, whose carelessness called for a reprimand from the foreman only three days before, drove for the first time an animal which, as the record shows, was a different animal from the one in use three days before and was a high-life, spirited animal that "needed attention." In *Rowe* v. *Such,* speaking of the driver, the court said that: "whether he lost control of his horse through negligence is not shown"; but in the cause at bar, there can be no doubt, upon Salapi's testimony, if nothing else, that Twining did carelessly lose control over the horse by permitting the lines to fall while his attention was distracted to Trainor. And since there is no proof that the harvester itself, or Trainor, or Knight

or Albano, or Salapi started Twining's horse to run, the only cause adequate to produce that result was Twining's failure to continue to exercise control over the horse:—the only inference which the facts in the cause at bar permit is that after Twining had reached the harvester, he lost control of his horse through that very inadvertence which, as we have seen, is of the essence of negligence. If the horse were unruly, liable to run away and dangerous with which to approach the mule team from behind, the master would be liable for the consequences: but if, on the other hand, as counsel contends, the horse was not unruly, or liable to run away, or a dangerous animal, then, why did not Twining continue to control him after he had reached the harvester? If Twining were exercising the same care, prudence and control that the law requires, and if neither the harvester nor any of its crew startled that horse, why did the horse run? What other inference was open to the jury as practical men, except that Twining exhibited the inadvertence of a youth, and carelessly permitted the horse to run? And in other respects, hereafter to be noted, there are divergencies between *Rowe* v. *Such* and the cause at bar. It should be added, also, at this point, that the Chief Justice dissented in *Rowe* v. *Such,* holding that the case made by the plaintiff "was clearly one for the jury."

But the authority of *Rowe* v. *Such,* even in the State of California, has been qualified by later cases.

Rowe v. *Such* dealt, if it dealt with anything at all, with the naked fact of a runaway: but in examining the authorities bearing upon this subject-matter, it is to be kept in mind, that even if the bare fact, without more, that the horse ran away, would not, in itself, standing alone, be sufficient to make out a *prima facie* case of negligence, rendering it incumbent upon the defendant to produce exculpatory evidence, yet, that fact, in connection with the circumstances attending the transaction, might very well, in a particular case, have that effect, even in the absence of any direct evidence of negligence. And this thought may well be illustrated by the recent case of *Bauhofer* v. *Crawford,* 16 Cal. App., 676. That was a case where a milkman was engaged in pouring milk from a large can on his wagon into another when the defendant, driving an automobile, collided with the wagon, and by so doing, injured the plaintiff. When the plaintiff rested, the lower court nonsuited him, but on appeal, this action by the trial court was reversed. The Appellate Court held that the driver of a vehicle should proceed carefully and be on the alert lest he collide with others; and the Appellate Court applied to the situation there in hand the doctrine of *res ipsa loquitur.* In discussing *Rowe* v. *Such,* the Appellate Court declared the effect of that case to be that no presumption of negligence arose from the mere fact that the horse ran away, but pointed out that in the case before it, "we cannot reasonably

attribute the accident to the carelessness of a third person,"—any more than in this present cause, we can attribute the starting of Twining's horse to the carelessness of any third person, or to any fright caused by the harvester; and the Appellate Court held that, "it would seem that the accident must "have resulted from the negligence of the defendant "and not from that of some third person. We there- "fore think that this is a case for the application of a "rule *res ipsa loquitur* and also of the principle that "he who has peculiarly within his power the means "of producing evidence of reasonable care shall be "required to do so" (page 680). This remark of the Appellate Court to the effect that "he who has "peculiarly within his power the means of producing "evidence of reasonable care, shall be required to "do so," operates a very distinct qualification of *Rowe* v. *Such.* In *Rowe* v. *Such,* the driver of the horse was named Baumert, and he was employed under the management and control of the defendant, Nelson: Baumert was Nelson's driver: Baumert was Nelson's employe: the horse and wagon belonged to Nelson, and Nelson was Baumert's employer; and the report of the case states that, "the driver of the "horse was not called by plaintiff as a witness, and "there was no evidence as to what caused the horse "to run away" (134 Cal., 574). But if, as the re- port of *Rowe* v. *Such* makes clear, Baumert were Nelson's employe and subordinate, and if, as the re-

port shows also, he were the person in charge of the horse and wagon at the time when the horse started to run away, then, he would be the person "who has peculiarly within his power the means of producing evidence of reasonable care," and he is the person who should be required to do so; but the plaintiff ought not to be put to the risk of resting his recovery upon the testimony of the guilty party." (*Breidenbach* v. *McCormick Co.,* 20 Cal. App., 184, 189); and the plaintiff who was suing Nelson along with the rest, should not have been expected to call as a witness the driver of the horse who was Nelson's employe, and working under his management and control. And so, in the later case, of *Breidenbach* v. *McCormick Co.,* 20 Cal. App., 184, expression is given to views which materially curtail the asserted universality of *Rowe* v. *Such.* There, the learned appellate court said:

> "The responsibility of the owner of a horse for "an injury committed by it begins at the moment "the owner takes the horse from its stall. He is "presumed to know how he handled the horse, "what he did with it and when and how it es- "caped from him, if it runs away. It may be that "the only witness to the cause of the runaway was "the owner or driver. The horse may have started "because left unhitched; or it may have taken "fright from some defect in hitching it to the "wagon, or from the wagon itself, or from some "part of the harness giving away or from some "object at the roadside, or from careless driving, "or from some other of the numerous causes of

"runaways. It would be an exceptional case of a "runaway in which the driver or owner could not "explain the case. But the plaintiff ought not to "be put to the risk of resting his recovery upon "the testimony of the guilty party. The rule laid "down in *Judson* v. *Giant Powder Co.,* 107 Cal., "556 (48 Am. St. Rep., 146, 29 L. R. A., 718, 40 "Pac., 1021), was as follows: 'When a thing "which causes the injury is shown to be under the "management of the defendant, and the accident "is such as in the ordinary course of things does "not happen if those who have the management "use the proper care, it affords reasonable evi-"dence, in the absence of explanation by the de-"fendant, that the accident arose from the want "of care.'"

Breidenbach v. *McCormick Co.,* 20 Cal. App., 184, 193.

In this case, also, *Rowe* v. *Such* was *distinguished,* the appellate court using the following language:

"It was held by the Supreme Court, in *Rowe* v. "*Such,* 134 Cal., 573 (66 Pac., 862, 67 Pac., 760, "that the rule in the Giant Powder Company case "did not apply to the facts in the Rowe case. In "that case, which is relied upon by appellants, the "horse was not unattended; the driver was on the "wagon at the time the horse started to run and "he was thrown off the wagon. There was no "evidence showing fault of the driver. All the "facts were before the jury and there was nothing "shown from which negligence could be imputed "to the driver. Hence the rule had no applica-"tion. But whether this particular rule should "apply or not, we think that, under the circum-"stances here appearing, there was sufficient evi-

"dence of negligence to call for an explanation by "the defendants and that the court erred in grant- "ing the motion for nonsuit."

And here, we have a very distinct declaration, that the fact of the runaway, when taken in connection with the various facts and circumstances appearing in the instant case, would have the effect of making out a *prima facie* case of negligence, rendering it incumbent upon the defendant to produce exculpatory evidence even in the absence of any direct evidence of negligence. And in the course of the discussion by the appellate court of the cases bearing upon this question, the court observed that "the plaintiff, in our opinion, was not called upon to make any explanation of the cause of the runaway, but that this duty devolved upon defendants." And it may be added that a petition to have *Breidenbach* v. *McCormick Co.* heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on December 20, 1912, (20 Cal. App., 193). *It is also to be observed that in cases of this character, it is well to bear in mind that whether in the particular jurisdiction the bare fact that a horse ran away is or is not, sufficient prima facie evidence of negligence, still, very little in the way of attending circumstances may, in any given case, be ample to give foundation for an inference of negligence.*

Breidenbach v. *McCormick Co.*, 20 Cal. App., 184, and authorities therein cited.

The foregoing criticism of *Rowe* v. *Such,* is not dissented from in the opinion of Judge Farrington: for, there, we find the language that "in *Rowe* v. *Such,* 134 Cal., 573, the cause of the runaway did not appear." In this opinion of Judge Farrington, after stating the case, and quoting the allegations of negligence in the complaint, the learned judge uses the following most significant language:

> "This leaves no basis for any presumption that
> "Twining negligently caused or negligently per-
> "mitted his horse to run by the mules. The negli-
> "gence, if there were any, occurred before or at
> "the time he lost control of the horse, and as to
> "what happened then, there is no testimony."

This is the central thought and the essence of Judge Farrington's decision. But in the case as presented upon the second trial, the defect which existed at the former trial was remedied by the testimony of Salapi, which testimony was fully corroborated by that of Knight, and to a very large extent by that of Twining. This testimony the jury accepted, as they had a perfect right to do; and it is, we respectfully submit, far more than enough to support and sustain the present verdict.

On page 16 of the brief for plaintiff in error, after citing the Clowdis case, reference is made to the Reed case, 51 A. S. R., 62: but in that case there was neither allegation nor proof of viciousness: she relied solely upon the ground that the horse was left

near the sidewalk, unattended; and hence, "viciousness" was not in the case, and any reference to it was sheer *obiter dictum.* In the case of *Hollyburton,* 38 L. R. A., 156, the horse was alleged to be "wild and dangerous and untrained"; but there was no evidence whatever in support of this allegation. In the *Eddy* case, 105 A. S. R., 897, we find a state of facts somewhat similar to those in the Reed case, *supra*: here, as there, the horse was rightfully in the street: here, the horse kicked, as there the horse bit: a verdict was directed for the defendant; and after detailing the facts, the appellate court said (page 899):

> "Under such circumstances the defendant, *in "the absence of testimony showing negligence in "management of the horse while in the street,* "would not be liable."

The case of *Coughlin,* 121 A. S. R., 158, cited on page 16 of the brief, was a case of leaving a horse in a street carefully fastened in the usual way; and it was held that this was not negligence, the court admitting, however, that one "must use ordinary care and prudence in fastening or restraining the same (horse) so as to prevent injuries" (page 163-4).

The *Fallon* case, reported in 34 A. R., 713, was a Rhode Island decision wherein the court agreed that a horse may be dangerous although not vicious: in that case the court said that if, while driving the horse harnessed, it had escaped from control *without negligence on the driver's part,* and running away

had injured the plaintiff, the defendant would not be liable: but we submit it to be a fair inference from this language, that if the horse had escaped from control by reason of negligence on the driver's part, the defendant would be liable. We cannot quite grasp the reason why the *Lynch* case in 104 A. S. R., 958, or the *Phillips* case in 11 Id., 458, should be cited: we fail to perceive their relevancy to the present cause. The *Billes* case in 91 A. S. R., 429, was that of a quiet and gentle horse: there was no evidence in that cause to sustain the inference that the horse in question was a high-lifed, spirited animal which needed attention, nor was there any evidence in that case to justify the inference that just before the fatal accident occurred, such a high-lifed, spirited animal had been excited and aroused and had its blood quickened by traveling at a rapid pace between a run and a gallop across a field, accompanied by zig-zags and circles; and in that case the court properly conceded that the disposition and temper of the horse should be considered upon an issue as to negligence. The *Kimball* case, 35 L. R. A., N. S., 148, deals solely with a runaway team; and in the *Creamer* case, 73 A. S. R., 186, cited on page 17 of the brief, the horse had previously been gentle and easily managed, and there was not a particle of evidence to show any negligence. The *Bennett* case, 47 Ind., 264, merely holds that in the absence of negligence, no liability attaches.

Crocker v. *Knickerbocker Ice Co.,* 92 N. Y., 652, cited on page 18 of the brief, concedes that drivers "must use proper care and prudence so as not to cause injury to other persons lawfully upon the streets"; and the court held that "there was no proof in this "case, or at least not sufficient proof for submission "to the jury *that the team was driven carelessly or* "*that the driver was negligent.*" *O'Brien* v. *Miller,* 25 A. S. R., 320, was a case wherein the court conceded that "the driver was exercising the highest care to prevent injury." In *Nilan* v. *Gas. Co.,* 1 N. Y., A. D., 234, there was no proof of negligence: in *Button* v. *Frink,* 50 A. R., it was held that no presumption of negligence arose from the bald fact that the horse ran away. In *Keck* v. *Sanford,* 2 Misc. (N. Y.), 484, there was no proof of negligence; and the same criticism is true of *Robinson* v. *Bletcher,* 15 Up. Can., Q. B., 159; and so likewise in *Brown* v. *Heather,* 8 U. S. Can. L. J., N. S., 86.

It should be added here that in the charge of the court below to the jury in this cause, the present plaintiff in error received the full benefit of *Rowe* v. *Such* (Record, p. 116, Par. 7); and that throughout the foregoing citation of authorities, Federal Decisions are conspicuous by their absence.

SUCCESSIVE VERDICTS.

It is a general rule that except in very extraordinary cases, a new trial will not be granted after successive verdicts have been rendered in favor of the same party to an action.

Milliken v. *Ross,* 9 Fed., 855;
Johnson v. *N. P. Ry.,* 46 Id., 347;
Joyce v. *Charleston Ice Co.,* 50 Id., 371; 54 Id., 332;
Linss v. *Chesapeake Ry.,* 91 Id., 964;
Clark v. *Barney Dumping Co.,* 109 Id., 235; 112 Id., 921;
Eaton v. *S. P. Co.,* 22 Cal. App., 461;
Carr v. *Am. Loco. Wks.,* Ann. Cas., 1912 B, 131 and note.

Upon the whole, we respectfully submit that the case is a meritorious one, that it was fairly tried below, that the present plaintiff in error has no real ground for complaint herein, and that the judgment should be affirmed.

Respectfully submitted.

J. J. DUNNE,
M. H. FARRAR,
Attorneys for Defendant in Error.

No. 2711

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILLER & LUX INCORPORATED
(a corporation),
Plaintiff in Error,

vs.

SAVERIO DI GIOVANNI PETROCELLI, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

EDWARD F. TREADWELL,
Attorney for Plaintiff in Error.

Filed this.....day of February, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

We shall not attempt any detailed reply to the voluminous brief on behalf of defendant in error. That it should be necessary to answer our fifty-nine page brief by a brief of two hundred and thirty pages would seem to indicate some serious infirmity in the facts relied upon to support this judgment. Counsel have so interwoven the various points actually involved in the case that it is almost impossible to extract them from the confusion; but we shall attempt to follow the order of our opening brief and ascertain briefly what counsel have actually brought forward in answer to it.

I.

TOTAL LACK OF EVIDENCE TO SHOW ANY LIABILITY.

(a) In support of the claim that plaintiff supported the allegation that defendant failed to supply the decedent with a safe place to work, counsel now claim that, while the harvester and team and everything connected with it were all right, the place became unsafe because a cart came up which only had two wheels and no brake. This awful indictment that the cart only had two wheels is repeated at least three times in the brief. Carts generally only have two wheels and generally have no brakes, and there is neither pleading nor evidence indicating that it is usual that they should be equipped with more wheels or with brakes. And then, in a vain attempt to uphold a judgment on a ground neither pleaded nor proved, counsel refer to a case where a railroad was held liable because the brakes on a railroad locomotive were out of repair, and that was alleged and proved to be the cause of the injury (*Choctaw etc. Ry. Co. v. Holloway,* 191 U. S. 334). A contention of this kind without pleading or proof to support it is entitled to no further attention.

(b) Counsel practically admit that the allegation that the horse was a vicious horse was not established, but claim that it was "restive" or "frisky". Of course, all horses, generally speaking, have some of these characteristics in greater or less degree, but that does not make them outlaws or place them in the class of vicious animals *for whose conduct the owner is an insurer.* In other words, counsel claim that while they allege negligence, they need not prove it because they allege that

the horse was vicious to the knowledge of the defendant; it is held in the case of *Clowdis v. Fresno Flume Co.,* 118 Cal. 315, that under such a pleading plaintiff could base a recovery on that ground if the vicious character of the animal was shown and knowledge of the owner. But in this case, although no proof was offered of the vicious character of the animal and the proof admittedly showed it was not of that character, the court authorized a verdict on the ground of the absolute liability of the owner (Rec., p. 123), and plaintiff seeks to sustain the verdict on the same ground. Of course any characteristic of the horse may be considered in determining the question of *negligence,* but the question of absolute liability irrespective of negligence should never have been submitted to the jury, and can not be relied upon to uphold the verdict.

(c) *On the question of negligence* counsel refer to several matters which merit brief reply.

1. They claim that the cart had only two wheels and no brakes. As we have pointed out, the absence of wheels or brakes was not relied upon by either pleading or proof as constituting negligence, nor did the complaint in any way call attention to anything being wrong with the *cart.* The only complaint made was as to the character of the *horse.*

2. The next claim is that Twining was only sixteen and a half years old and therefore too immature to intrust with the duty of driving a horse and cart! Here again we have no pleading or proof that it was negligent to intrust a boy of that age with a horse and cart, but apparently the court is called upon to

determine from its judicial or other knowledge that such conduct does constitute negligence. Personally, I left the farm at twelve years of age and therefore do not feel competent to determine what a boy of sixteen and a half should be permitted to do on a farm. Before I was twelve I rode everything that was ridable and drove everything that was drivable, but I suppose if I had remained until I was sixteen and a half I would have only been considered safe when riding a hobby horse. I trust that some members of the court perchance may have remained on the ranch until they were older so they can appreciate and decide as a matter of law why it is that a boy of sixteen and a half years old is so helpless, and why any one who employs him to help him through high school is, without pleading and without proof, to be held guilty of negligence for doing so, and is also to be insulted by the suggestion that the reason that an able-bodied man was not employed was because it would cost more.

3. Counsel also suggest that Twining must have been guilty of negligence because he did not testify at the coroner's inquest or at the first trial. He was not asked to testify at the coroner's inquest (Rec., p. 111) and was ready to testify at the first trial but was not called because the defendant put in no evidence (Rec., pp. 110-111) and plaintiff made no case (see Opinion of Judge Farrington in Appendix to our Opening Brief).

4. Another claim is that he must have been guilty of negligence because he went away from the scene of

the accident. He went to report the accident to the foreman (Rec., p. 104).

5. Again counsel claim that he should have stayed back of the harvester instead of coming alongside of it. The evidence is that it was entirely safe and usual to come alongside of the harvester just as he did to get the count of the sacks. The witness Knight testified:

> "It is not an extraordinary or unusual thing at all to drive a cart up *alongside* of the machine for the purpose of getting the count of the sacks or for any other purpose" (Rec., p. 45).

Of course he might have stayed outside of the field, or trailed along behind the harvester where he would have been unseen and could not get the count, but if a person does just what is ordinary and usual he can not be said to be negligent.

6. Counsel place some emphasis on the fact that when Twining approached, Knight went to the brake. This is nothing unusual but is what is always done when any one approaches the harvester. Knight testified:

> "It is the usual thing I do when any one approaches the harvester. There is nothing unusual in that at all" (Rec., p. 47).

7. Counsel admit that Twining was walking his horse alongside of the harvester before it ran away (Brief, pp. 100, 106).

8. They also put some weight on the fact that Twining had the lines in his left hand. *He was left-handed* (Rec., p. 104).

9. Counsel attempt to *infer* that he had no experience and had never been to a harvester but once before. He had been doing this work for a month and a half (Rec., p. 99).

10. Counsel take several pages of their brief showing how exactly alike is the testimony of Salapi and Twining, and then when they find that in our brief we stated that there was no material difference between them on the material facts, counsel attempt to show marked discrepancies between them. We are willing to submit the case on the testimony of plaintiff's witnesses, or defendant's witnesses, or both. The case is not one of *conflict* of evidence, but *lack* of evidence.

11. After themselves questioning the testimony of Salapi and Albano because they were Italians (Brief, p. 67), counsel proceed to show how unfounded is that attack.

12. Counsels' final argument is the one that they have insisted on from the first, viz.: *that there is a presumption of negligence,* or upon the doctrine of *res ipsa loquitur.* We had supposed that this contention had been set at rest by the very able opinion of Judge Farrington, printed as an appendix to our brief. But counsel now claim that the decision in *Rowe v. Such,* 134 Cal. 573, holding that when a horse runs away with the driver there is no presumption of negligence, is not binding on the federal court. Assuming that it is not absolutely binding, it is in accordance with all the authorities on the subject, and counsel have not been able to find a single case to the contrary.

Counsel then seek to claim that the case of *Rowe v. Such,* supra, has been overruled. The first case they refer to in support of this contention is

Bauhofer v. Crawford, 16 Cal. App. 676,

in which the court held that where an automobile collided with a wagon the doctrine of *res ipsa loquitur* would make out a case, but said:

> "It is unlike the case of a runaway horse in charge or not in charge of his driver, causing injury, for in such a case it is as reasonable to infer that it was the negligence of a stranger as to assume it was that of the driver which caused the horse to run away. In cases of that kind the rule fails, and the doctrine *res ipsa loquitur* can not be invoked (Rowe v. Such, 134 Cal. 573 (66 Pac. 862, 67 Pac. 700), and cases cited."

It will, therefore, be seen that this case not only does not overrule, but reaffirms, the case of *Rowe v. Such.* The next case relied upon by counsel is

Breidenbach v. McCormack Co., 20 Cal. App. 184.

In view of the fact that the Court of Appeal of California is an inferior court to the Supreme Court, it is not to be assumed that that court has attempted to overrule the Supreme Court, and an examination of that case will show that that decision not only does not overrule the case relied upon by us, but on the contrary strongly reaffirms it, and also shows that the decision is in accordance with the general rule adopted throughout the United States. In that case the plaintiff was injured by a runaway horse on the streets of Stockton and testified:

> "There was no driver on the wagon. I am positive of that" (p. 187).

Another witness testified that the horse had a rope on but the rope was not dragging but was tied up on the hames (p. 187). The contention of the plaintiff was

> "That the horse and wagon belonging to the defendant was running away unattended and the hitching strap was not loose and dragging but was fast to the hames. Everything therefore indicated negligence on the part of the defendants or their employees and we maintain the burden was thrown on the defendant to show that the horse was attended or properly secured, or that its running was wholly without fault of the defendants or their employees."

In upholding this contention the court said:

> "It was held by the Supreme Court in *Rowe v. Such,* 134 Cal. 573, that the rule in the Giant Powder case did not apply to the facts in the Rowe case. In that case which was relied upon by appellants the horse was not unattended; the driver was on the wagon at the time the horse started to run and he was thrown off the wagon. *There was no evidence showing the fault of the driver. All the facts were before the jury and there was nothing shown from which negligence could be imputed to the driver.* * * * The decisions are generally to the effect that the running away of a horse *where no driver is present* creates a prima facie case of negligence on the part of the owner. *Where, however, a horse runs away with his driver, it has been held that there is nothing in that fact itself to show negligence on the part of the driver.* (29 Cyc. 595.)
>
> "Generally negligence will not be presumed from the mere fact that a horse ran away unless the horse was unattended. (6 Thompson on Negligence, sec. 7665.)"

The court then proceeds to cite a considerable number of cases, all holding that where a horse runs away "unattended" there is a presumption of negligence and held that as that was the fact in that case, defendant was liable and the rule laid down in *Rowe v. Such* did not apply.

This case very clearly recognizes the distinction relied upon by us and which is based upon good sense and reason, namely: that if a horse runs away without the driver in attendance it must be assumed that the driver left the horse unhitched, or something of that kind; whereas, if the horse runs away while the driver is in the wagon, as in the case at bar, there is no presumption that the driver had done anything improper, but on the contrary so far as the evidence goes it would appear that he was doing just what he was required to do, and in that case there is no presumption of negligence whatever.

It therefore appears that not only has *Rowe v. Such* (decided in 1901) not been overruled, but has been reaffirmed, and this horse having run away *with* the driver "holding the horse pretty strong" (Rec., p. 36) and "holding the horse all he could" (Rec., p. 53) there is no presumption of negligence, and being no proof of negligence the verdict is unsupported.

II.

LACK OF ADMINISTRATOR'S BOND.

Counsel cite certain cases from other states holding that the absence of a bond does not render the letters void. The sufficient answer to this is that in this state it

is held to render them void. Counsel cite the case of *Abrook v. Ellis,* 6 Cal. App. 451, but that simply goes to the point that when the amount of the bond is fixed by the probate court, it can not be attacked collaterally on the ground that it is not in double the value of the property. The other case relied on is *Dennis v. Bint,* 122 Cal. 39, but it only holds that the absence of the seal on the letters does not invalidate them. It does not overrule the earlier cases holding that failure to give a bond renders the letters void, but simply refuses to "extend" those cases. It was not necessary to make this point in the court below, since it was a question of failure of proof and for aught that appears we may have made it in argument to the jury or on motion for new trial. We did make it in our answer (Rec., p. 26).

Nor can the claim of counsel be upheld that even if plaintiff is not administrator, still he may recover because he is a nominal party. If he is not administrator the judgment would not protect us against another judgment by the real administrator.

III.

NO PROOF OF HEIRSHIP.

Counsel having obviated the lack of an administrator, proceed to brush aside the necessity of heirs in the same way. They say that the failure to allege the heirs is waived if not made by demurrer. This may be true as to the *pleading* of heirs, but can not be true as to the *proof* of heirs. This distinction is observed by the

court in the case of *Texas & P. Ry. Co. v. Lacey,* 185 Fed. 225, relied upon by counsel, where it was held that failure to allege that a boy of eighteen was not married was waived, and that it was proved by the presumption that non-marriage continued as long as things of that kind generally continue and boys do not generally marry at eighteen. This is on the theory that defect in pleadings may be cured by verdict; lack of proof never can.

Counsel then rely as proof upon the probate records. Certainly the proceedings for letters are not evidence against third parties as to heirship. But the probate court did not find who the heirs were (Rec., p. 79), but the petition says that the heirs are Giuditta di Giovanni Petrocelli Spina and Assunta Spino, whereas the only person claiming to be widow was *Guiditta Petrocelli, and she did not connect herself at all with the man who was killed, nor did she testify that the child was his.*

Counsel next attempt to supply the missing proof by a "colloquy" between the court and the attorney for plaintiff. The first is a statement by counsel that he *intends* to call the widow and prove the facts by her (Rec., p. 85), and the next is a statement by counsel that the child "is his child" (Rec., p. 104). Certainly we were not bound by the statement of counsel of what he *intended* to prove or what he *thought* he had proved, and the court so instructed the jury (Rec., p. 122).

Counsel next contend that there was no contest in the court below as to heirship. The contest is evidenced by the pleadings in which we denied heirship (Rec., p. 26). Whether we did or did not argue the lack of proof

before the jury or judge can not be made to appear in the record.

Counsel in no way questions the insufficiency of the *evidence* to prove that the particular man who was killed was married to the alleged widow, Guiditta di Giovanni Petrocelli Spina or was the father of Assunta Spina.

This matter is not technical, for unless the parties are the real heirs we would not be protected by the judgment from an action in behalf of the real heirs.

IV.

NO ALLEGATION OR PROOF OF DIVERSITY OF CITIZENSHIP.

Counsel consume considerable space in trying to prove that Spin*a* and Spin*o* are *idem sonans,* but the question here involved is whether Jovetta Spino and Sunda Spino are *idem sonans* with Giuditta or Guiditta di Giovanni Petrocelli Spina and *Assunt*a Spina; if not, there is neither pleading nor proof of their citizenship. By placing in juxtaposition these names, the entire lack of identity will be apparent:

Peter	Pietro
Spino	Spina
Giuditta	Guiditta
Jovetta	Giuditta
Giuditta di Giovanni Petrocelli Spina	Guiditta Petrocelli
Sunda	Assunta
6 years old July, 1913	10 years old August, 1914.

We certainly submit that there is neither pleading nor proof that Giuditta di Giovanni Petrocelli or Assunta Spina are citizens of Italy.

But counsel claim that the removal proceeding was our "handiwork" and alleged the citizenship. It alleged the citizenship of *Jovetta Spino and Sunda Spino,* heirs of Peter Spino. It did not allege the citizenship of the parties named in the amended complaint.

Counsel next refer to cases holding that a person sued in the federal court may waive the objection that he is sued *in the wrong district,* and consequently if he removes the case into the federal court he can not subsequently claim that it was improperly removed thereto because it could not have been originally brought in the court of the particular district. This is a waiver of the jurisdiction over the person. Jurisdiction based on diversity of citizenship can not be conferred by consent as is shown by the authorities cited in our brief.

But counsel say no new cause of action was stated by filing the amended complaint, and we having consented to the filing must have taken that view. The cause of action was the same, but the beneficial interest in the recovery was in favor of different people. It is unnecessary to determine whether of right the complaint could be amended by changing the allegation as to heirship. It having been done by consent, no one can question it. But it having been done, properly or improperly, it was necessary to show that the claim was within the jurisdiction of the court. Counsel evidently took this view for they alleged the *residence* of the

heirs. It is no fault of ours that they did not allege their *alienage.*

V.

EVIDENCE OF PREVIOUS ACT OF NEGLIGENCE.

The principal answer to this error is a criticism of the assignments of error. The assignments of error were filed before the bill of exceptions was settled, and as often happens the evidence set forth therein differs in form from that in the bill of exceptions, but assignments I to IV clearly apply to the evidence admitted over our objection and found at pages 39-40. The claim that the objection that the evidence was "immaterial to any issue in the case", and had "no possible relation with anything that took place on the first day of July, when the injury occurred", is too general seems to us to be unfounded. When the objection goes to the entire materiality of the testimony to the issues this is the only form of objection that can be used. The cases counsel refer to are cases where the evidence is relevant, but some technical defect or lack or foundation is relied upon.

VI.

ERROR IN SUBMITTING TO JURY ABSOLUTE LIABILITY FOR VICIOUS ANIMAL.

Counsel make no real attempt to justify a recovery on this ground, and practically abandon the claim that the animal was of that character, but claim that it was of such a character that it needed "attention". Most

horses do, but that does not make the owner liable *as an insurer* of their conduct, as the court instructed the jury was the law when the animal was vicious.

VII.

CONTRIBUTORY NEGLIGENCE.

On this subject counsel admit that our instructions under section 1 of the Roseberry Act were correct, but state that we admit that no gross negligence was charged and therefore it was unnecessary to instruct upon it. We are unable to find in our brief any such admission. Counsel also claim that there are no degrees of negligence. The Roseberry Act refers to the case "where his contributory negligence was *slight* and that of the employer was *gross,* in comparison". Whatever this may mean, we were entitled to have the law thus laid down given to the jury. Whether the legislature intended to give life to *degrees* of negligence as laid down by some courts and repudiated by others, or to simply lay down a rule of *comparative* negligence, it is unnecessary to determine; but it is clear that the legislature intended to abolish the plea altogether in some cases, and divide the responsibility in others, and we were entitled to have the jury so instructed. Counsel quote Judge Thompson, as follows:

> " 'This doctrine, which visits upon the plaintiff or person injured, all the consequences of the defendant's negligence, although the plaintiff's negligence might have been slight and trivial, and that of the defendant gross and wanton, is cruel and wicked and shocks the ordinary sense of justice of mankind.

> Such a rule finds no proper place in an enlightened system of jurisprudence.' ''

Still counsel say an instruction which misstated the law in our favor, but in a manner which *''is cruel and wicked and shocks the ordinary sense of justice of mankind''* and *''finds no proper place in an enlightened system of jurisprudence''*, could not be hurtful to us. Such an argument overlooks the human side of the jury system, and assumes that the jury would be as ready to enforce a defense which is cruel and wicked and shocks the ordinary sense of justice, as it would be to enforce a defense based on a law which now forms a part of our enlightened system of jurisprudence.

But counsel say that section one of the Roseberry Act was not applicable. It is applicable to every case of contributory negligence by the employee and lays down the rules of law applicable thereto.

VIII and IX.

Counsel attempt no real answer to either of these propositions.

X.

TECHNICAL OBJECTIONS.

Counsel make certain technical objections to the consideration of the errors relied upon which we shall briefly consider:

1. The objections to the form of the assignments of error we have already considered.

2. The suggestion that error in refusing instructions can not be considered because the entire charge is not set out has no foundation, for even at the risk of violation of rule 10 of this court we did set forth in the bill of exceptions the entire charge of the court (Rec., pp. 114-123).

3. Counsel next claim that our motion for a peremptory instruction in favor of defendant was waived. This motion was made *after* all the evidence was in (Rec., p. 114). The cases cited by counsel all relate to a motion for nonsuit made at the completion of the evidence of plaintiff and which is waived by subsequently putting in evidence. It is a curious contention that a motion made after all the evidence of both parties is in is waived by evidence put in *before* the motion is made.

4. A more serious but less conscionable objection is that the exception to instructions can not be considered because not made at the time the same were given. Under the state law instructions are deemed excepted to (C. C. P., sec. 647) and on the trial the parties stipulated that the state law should govern (Rec., p. 129). The following stipulation was also entered into while the jury was still in the box:

> "After the court charged the jury, and while the jury was still in the box, the following stipulation was entered into in open court at the suggestion of the court with regard to the taking of exceptions to the giving of its instructions and refusal of instructions requested:

"The COURT. The rule of court requiring exceptions to be noted at the time—it is generally the practice to waive that and allow the exceptions to be taken at a subsequent time. Will you stipulate that may be done?

"Mr. DUNNE. Yes, your Honor, if it is agreeable to counsel on the other side.

"Mr. SHORT. Yes."

(Rec., p. 129.)

Counsel, with an assumption of innocence which poorly fits them, complain that the court treated this as a stipulation (Brief, p. 37). The court did treat it as a stipulation and a stipulation which counsel could not with honor repudiate. We treated it as a stipulation and the judge's direction as an order as to the conduct of the trial, and the attempt of counsel to repudiate it has been the cause of almost shattering our idea that the stipulations and agreements of counsel made in open court are the highest type of gentlemen's agreements. We are aware of the strict rules that this court has adhered to on this subject, but we still venture to hope that this court will find some way of holding that, when the parties have stipulated to a form of exception, and the trial judge not only then, but in settling a bill of exceptions has shown that he is satisfied that the method followed has caused no wrong to the parties or the court, a rule, based on the assumed right of the trial judge to be protected from pitfalls, shall not be used to authorize the repudiation of a solemn stipulation. The rule itself is a rule adopted in "fairness to the court which makes the ruling complained of" (*Mountain Copper Co. v. Van Buren,* 133 Fed. 1, 8) and while this court may not be "*bound* to consider"

exceptions taken in any other manner (Id., p. 8), we know of no decision of this court holding that it is powerless to do so. As was said by Taft, C. J., in

Johnson v. Garber, 73 Fed. 523, 527:

> "It does not appear that the defendant's counsel made any agreement by which the exceptions reserved at the time of tendering the bill of exceptions should be considered as having been made at the time of the trial. If such an agreement had been made, it might possibly have been the duty of the court below to enforce it by making the bill of exceptions show that the exceptions were reserved at the time of the trial, on the ground that any other bill of exceptions would be *a fraud upon the party misled by such agreement.*"

Nor is there any decision preventing this court from adopting the view of Noyes, C. J., in *Mann v. Dempster,* 179 Fed. 837, 839, and 181 Fed. 76, 82, that the action of the trial court in adopting a rule of practice which deprives a party of his exceptions is itself a ground of reversal without formal exception. No court should willingly make it possible that a "fraud" be perpetrated. That *form* should control *substance* has never been, and we trust never will be the aim of this court, and there should be nothing so sacred in a rule of court that it can not be abrogated by agreement of the parties, and the judge of the court, at least to the extent of *permitting* this court to give its approval to such abrogation, when the character of the instructions excepted to go to the very meat and substance of the case.

We ask the court to note that in the Southern District this judge states that it is generally the practice

to waive the rule requiring exceptions to be noted at the time the instructions are given (Rec., p. 129). This is the fact and the practice is to allow the exceptions in the bill as if so taken. In other words, the attorneys observe the stipulation. An attorney should not be permitted to take advantage of a practice and then deprive the other party of the benefit thereof, and the finding of the trial court that counsel are estopped from doing so (Rec., p. 131) should be followed by this court.

Respectfully submitted,

EDWARD F. TREADWELL,
Attorney for Plaintiff in Error.

No. 2713

Re 2709

United States

Circuit Court of Appeals

For the Ninth Circuit.

HOONAH PACKING COMPANY, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index.

[Names and Addresses of Counsel.]

CHENEY & ZIEGLER, Juneau, Alaska,
Attorneys for Plaintiff in Error.

J. H. COBB, Juneau, Alaska,
Attorney for Defendant in Error.

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1326–A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

HOONAH PACKING CO., a Corporation,
Defendant.

Complaint.

The above-named plaintiff complaining of the above-named defendant, for cause of action alleges:

I.

The defendant is a corporation, duly incorporated, and engaged in the fishing and canning business in the Territory of Alaska.

II.

That during the month of June, 1915, and continuously up to the present time, the said defendant was engaged in, and prosecuting and attempting to prosecute the business of fishing by means of eleven (11) fish-traps in the Territory of Alaska, which said traps are more particularly described as follows:

1st. A certain trap designated as No. 3, situate at Gull Cove, Idaho Inlet, in Icy Straits.

2d. A certain trap designated as No. 4, situate on the west shore of Mud Bay in Icy Straits.

3d. A certain trap designated as No. 6, situate at Mud Bay in the waters of Icy Straits.

4th. A certain trap designated as No. 9, situate [1*] on the east side of Mud Bay in Icy Straits.

5th. A certain trap designated as No. 10, situate on the east side of Idaho Inlet in Icy Straits.

6th. A certain trap situated about two miles south of Funter Bay on the west shore of Admiralty Island, in the waters of Chatham Straits, and in front of U. S. Survey No. 804.

7th. Five (5) other traps, the exact location and description of which are to the plaintiff unknown, but all of which are within the waters of Southeastern Alaska.

III.

That by an act of the Alaska legislature, approved April 29th, 1915, entitled "An act to establish a system of taxation, create revenue, and provide for collection thereof, for the Territory of Alaska, and for other purposes; and to amend an act entitled 'An act to establish a system of taxation, create revenue, and provide for collection thereof for the Territory of Alaska, and for other purposes,' approved May 1, 1913, and declaring an emergency,"—a tax of One Hundred Dollars ($100) was imposed upon each and every fish-trap, which said tax, by the terms of said act, became due and payable on the 1st day of July, 1915.

IV.

That the defendant, though prosecuting the busi-

*Page-number appearing at foot of page of original certified Record.

ness of taking fish in said traps as aforesaid during the current season, has failed, neglected and refused to pay said tax or any part thereof.

WHEREFORE, plaintiff sues and prays judgment for the sum of Eleven Hundred Dollars ($1100.) with interest [2] thereon at the rate of eight (8) per cent per annum from July 1st, 1915, and all costs of suit.

J. H. COBB,
Chief Counsel for the Territory of Alaska.

United States of America,
Territory of Alaska,—ss.

J. H. Cobb, being first sworn, on oath deposes and says; I am chief counsel for the Territory of Alaska. The above and foregoing complaint is true as I verily believe.

J. H. COBB,

Subscribed and sworn to before me this 7th day of July, A. D. 1915.

E. L. COBB,
[Notarial Seal] E. L. COBB,
Notary Public in and for Alaska.

My commission expires Dec. 3, 1918.

Filed in the District Court, District of Alaska, First Division. Jul. 7, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy.

[Endorsed]: Original. No. ——. In the District Court for the Territory of Alaska, Division Number One, at Juneau. The Territory of Alaska, Plaintiff, vs. Hoonah Packing Co., a Corporation, Defendant. Complaint. J. H. Cobb, Chief Counsel for the Territory of Alaska. [3]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Case Number 1326—A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,

Defendant.

Demurrer.

Comes now defendants by its attorneys, Z. R. Cheney and A. H. Ziegler, and demurs to the plaintiff's complaint upon the following grounds:

I.

That the Court has no jurisdiction of the subject of the action.

II.

That the complaint does not state facts sufficient to constitute a cause of action, for that the act of the Alaska legislature, approved April 29th, 1915, entitled, "An act to establish a system of taxation, create revenue and provide for collection thereof, for the Territory of Alaska, and for other purposes," and to amend an act, entitled, "An act to establish a system of taxation, create revenue and provide for collection thereof, for the Territory of Alaska, and for other purposes," approved May 1st, 1913, and declaring an emergency, is unconstitutional and void, for the reason that same is contrary to the provisions of the Organic Act for the Territory of Alaska, entitled, "An act to create a legislative

assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes." Approved August 24th, 1912.

Z. R. CHENEY and
A. H. ZIEGLER,
Attorneys for Defendants.

Copy received and service admitted this 17th day of July, 1915.

J. H. COBB,
Attorney for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Jul. 21, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy. [4]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1325–A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

No. 1326—A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,
Defendant.

Memorandum Opinion [on Demurrer]. [5]

By act approved April 29, 1915, the Legislature of Alaska provided as follows:

> "Section 1. That any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska, shall apply for and obtain a license and pay for said license, for the respective lines of business as follows:
>
> . . . . . .
>
> 8. Fish-traps, fixed or floating, $100.00 per annum. So-called dummy traps included."
>
> . . . . . .

It also provides in Section 2 that

> "Every person, firm or corporation desiring to engage in any of the lines of business specified in section 1, shall first apply to and obtain from the territorial treasurer a license. If the tax for the license applied for is a fixed sum, the amount of such license tax shall accompany the application."

Said Section 2 further provided for the bringing of a suit, either civil or criminal, to collect the license, and section 4 of the said act provided:

> "Special remedies provided by this act . . . shall not be deemed exclusive, and any appropriate remedy, either civil or criminal or both, may be revoked by the Territory in the collection of all taxes; and in civil actions the same penalties may be collected as are herein provided in criminal actions."

Under the provisions of this act of the legislature, the Territory of Alaska brought suit against the defendant, alleging in the complaint:

> "That during the month of June, 1915, and continuously up to the present time the defendant was engagd in and prosecuting and attempting to prosecute the business of fishing by means of fish-traps situate in the waters of Alaska, and that it has failed, neglected and refused to pay the license tax, or any part thereof, provided for by said act of the legislature. Wherefore the Territory asks for judgment for the amount of the license tax due."

To this a demurrer has been interposed, on the ground that the said complaint does not state facts sufficient to constitute a cause of action, and in support of the demurrer the point is raised that the legislature had no power to impose such a tax, for the reasons—

1. Congress has reserved to itself the exclusive control of the fish and game of Alaska. [6]

2. The said tax is in violation of section 9 of the Organic Act of the Territory (Act of June 26, 1906 aforesaid), which provides:

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessment shall be according to the actual value thereof."

As to the first point raised in support of the demurrer, to wit: "Congress has reserved to itself the exclusive control of the fish and game of Alaska"; it is urged that by the act approved June 26, 1906, (34 Stat. L. 478), Congress provided:

"That every person, company or corporation carrying on the business of canning, curing or preserving fish, or manufacturing fish products within the Territory known as Alaska . . . shall, in lieu of all other license fees and taxes therefor and thereon, pay a license tax on their said business and output as follows:

Canned Salmon, 4¢ per case;
Pickled Salmon, 10¢ per barrel;
Salt Salmon in bulk, 5¢ per 100 pounds;
Fish Oil, 10¢ per barrel;
Fertilizer, 20¢ per ton";

and that the Organic Act of the Territory, passed six years after the act of 1906, and which provides:

"that the power of the legislature should not extend to the fish laws . . . or to the laws of the United States providing for taxes on business and trade; provided, further, that this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses" (C. L. 1913, Sec. 421)

should be taken to mean that the legislature is not prohibited from imposing other and additional licenses or taxes "on other kinds of industries and on other kinds of business or trade not covered by the act of 1906."

The reasoning advanced why the Court should so hold is not convincing—on the contrary, as the Organic Act is the latest expression of the legislative will on the subject, it would seem that it must be taken as repealing that part of the former act which is in conflict therewith, to wit: "shall, in lieu of all

other license fees and taxes." For the Court to hold that the later act does not repeal the former act to the extent indicated, it would be compelled to read into the later act some words which [7] are not there, to wit: "On other kinds of industries and on other kinds of business or trade not covered by the act of 1906." This would not be justified by any canon of construction. The very position of the proviso in the statute shows what Congress had in mind, to wit, that in imposing other and additional licenses or taxes the legislature should not be fettered by anything contained in the act of 1906. It is not apparent that there is any need of construction, for the language is plain and unambiguous. A reference to the debates in Congress when the bill was before it would clear up any ambiguity if, indeed, any such existed.

The bill came up for argument on Wednesday, the 24th of April, 1912. In its original form the proviso was as follows:

> "That the authority herein granted to the legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal or other general laws of the United States";

and nothing was there said about the game or the fish. Whereupon the following occurred:

Mr. WILLIS.—Mr. Chairman, I offer the following amendment, which I send to the desk and ask to have read.

The Clerk read as follows:

Line 9, page 23, after the word "States," insert

the words "or to the game laws of the United States applicable to Alaska."

Mr. MANN.—Why not make it game and fish laws?

Mr. WICKERSHAM.—Mr. Chairman, I think the fish laws ought to be left alone.

Mr. MANN.—Why not make it game and fish laws, so that they cannot repeal the fish laws? They can pass new fish laws.

Mr. WILLIS.—Mr. Chairman, I will accept that amendment, and ask unanimous consent that it be so modified and reported as modified.

The CHAIRMAN. — Without objection, the amendment will be so modified, and the clerk will report the amendment as modified.

The Clerk read as follows:

Line 9, page 23, after the word "States" insert the words "or to the game and fish laws of the United States applicable to Alaska."

Mr. WICKERSHAM.—Mr. Chairman, I do not think that the word "fish" ought to be in there. I think the fisheries in Alaska need protection. They belong to the people of the State or to the Territory, and they do not belong to the Government of the United States. They are not now being protected. They are not now being conserved, and if this legislature will do something toward conserving and protecting the fish it ought to be allowed to do it. This simply bars the legislature from protecting the fisheries in that Territory, and it ought not to be in the bill. [8]

Mr. MANN.—The gentleman will notice this pro-

vision does not apply to passing laws, but only to the repealing of laws.

Mr. WILLIS.—It seems to me the observation of the gentleman from Illinois answers the objection of the gentleman from Alaska. It simply provides, if it shall be adopted, that the legislature of the Territory of Alaska shall not have the power to alter, amend or repeal the United States fish or game laws now in force in the Territory. It does not take away from the legislature the power to pass additional laws of that character. It seems to me that meets the objection.

Mr. WICKERSHAM.—I think they ought to be allowed to amend them.

Mr. WILLIS.—We have a Federal fish law in Alaska. The gentleman is not objecting to that.

Mr. WICKERSHAM.—No.

Mr. WILLIS.—That is all this amendment provides—that the legislature shall not have the power to amend the present fish or game laws.

Mr. WICKERSHAM.—What does that mean?

Mr. WILLIS.—It means that the present law shall stand.

Mr. FLOOD of Virginia. Suppose Congress passes a law revising and extending the fish laws there?

Mr. WILLIS.—Well, undoubtedly that will be the paramount law of Alaska.

Mr. FLOOD of Virginia. What will be the effect of the gentleman's amendment?

Mr. WILLIS.—The effect of this amendment will be, as I understand it, simply to take away from the

legislature of Alaska the power to amend the fish or game laws now in effect in Alaska.

Mr. FLOOD of Virginia. It would not have the effect to take away from the legislature of Alaska the power to amend the fish laws we hereafter pass.

Mr. WILLIS.—No; I do not think it would, as I have worded it, although I did not have that in mind when I drafted the amendment.

Mr. MANN.—They would not have that power.

Mr. WLLIS.—They would not have that power now.

Mr. FLOOD of Virginia. The gentleman is aware of the fact there is a proposition to revise the fish laws?

Mr. WILLIS.—Yes; I think the bill is a good one and ought to pass.

Mr. FLOOD of Virginia. And will in all probability become the law.

Mr. WILLIS.—It seems to me this meets the objection that has been raised in a perfectly fair manner, and I think it is a fair objection, but I do not believe the legislature ought to repeal the present game or fish laws.

Mr. MANN.—We have endeavored to provide in a way for the conservation of the fisheries and game up there. We ought not to permit those laws to be repealed, but if they want to make them more stringent, and probably do, they ought to have that right.

Mr. FLOOD of Virginia. I do not think the amendment means anything, but if it will please anybody to put it in, why, let it go.

Mr. WICKERSHAM.—I shall withdraw my objection.

The question was taken, and the amendment was agreed to.

(Vol. 48, Part 6, page 5288, Congressional Record, 62d Congress, Second Session.)

This, however, did not seem to be specific enough for the Senate, for when the bill reached that body it was amended by having added to it this provision: [9]

> "Provided further that this provision shall not operate to prevent the legislature from imposing other and additional taxes and licenses."

The House refused to agree to this and to several other amendments, and the committee on conference of the House reported, recommending that the House recede from its disagreement to this Senate amendment. The House did recede from said disagreement, and the Senate proviso was added to the bill.

This occurred on August 20, 1912, and the record of it is found in said Congressional Record at page ——.

Thus it will be seen—

1. That there is on the face of the bill no expression of any such purpose as is contended for.

2. That no such purpose as is contended for was in the minds of the legislators when the bill passed, but on the contrary what was in their minds was that the legislature should have the power to levy additional taxes on the fish and the game business and on other businesses.

As to the second point raised in support of the de-

murrer, to wit: "The said tax is in violation of section 9 of the Organic Act of the Territory";

A reference to the legislation and to one Supreme Court decision on the subject of the taxation of the fisheries business in Alaska may throw some light on the subject.

By the criminal code of Alaska, adopted March 3, 1899 (C. L. 1913, Sec. 2569), Congress provided:

> "That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business, within the District of Alaska shall first apply for and obtain a license so to do from a District Court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, to wit: . . .
>
> Fisheries: Salmon Canneries, 4¢ per case;
> Salmon Salteries, 10¢ per barrel;
> Fish Oil Works, 10¢ per barrel;
> Fertilizer Works, 20¢ per ton."

The point was raised that this act was in violation of section 8, article 1 of the constitution of the United States, [10] which reads:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, . . . but all duties, imposts and excises shall be uniform throughout the United States";

and that said act, insomuch as it directed the money to be paid into the treasury of the United States could not be sustained. The point was passed upon in the case of Binns v. United States (194 U. S. 486,

decided May 31, 1904), and Justice Brewer, at page 491 says:

> "We shall assume that the purpose of the license fees required by section 460 is the collection of revenue, and that the license fees are excises within the constitutional sense of the terms. Nevertheless we are of the opinion that they are to be regarded as local taxes imposed for the purpose of raising funds to support the administration of local government in Alaska.
>
> It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. We are accustomed to that generally adopted for the Territories, of a *quasi* State Government, with executive, legislative and judicial officers, and a legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the district. It may entrust to them a large volume of legis-

lative power, or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that Territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes."

And later on in the decision the learned Justice quotes the following from volume 32 Congressional Record, part 3, page 2235, to wit:

"'The committee on Territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the government of the [11] Territory of Alaska. . . . They are licenses peculiar to the condition of affairs in the Territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on

Territories, after consultation with prominent citizens of the Territory of Alaska, including the Governor and several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions and upon the information of the committee derived from conversing with them.'

While, of course, it would have simplified the matter and removed all doubt if the statute had provided that those taxes be paid directly to some local treasurer and by him disbursed in payment of territorial expenses, yet it seems to us it would be sacrificing substance to form to hold that the method pursued when the intent of Congress is obvious, is sufficient to invalidate the taxes.

In order to avoid any misapprehension we may add that this opinion must not be extended to any case, if one should arise, in which it is apparent that Congress is, by some special system of license taxes, seeking to obtain from a Territory of the United States revenue for the benefit of the nation as distinguished from that necessary for the support of the territorial government.''

Thus it will be seen that the license was declared to be a tax and was sustained as not being in contravention of the said article of the Constitution, on account of the fact that the money, although to be paid into the treasury of the United States, was to be used for the support of the Territory—in other words, that it was a tax imposed on businesses in

Alaska by Congress, the then legislative body for Alaska, for local purposes.

Then came the acts of Congress of March 30, 1906, and of March 24, 1912, *supra.*

Such being the state of Federal legislation on the subject of taxing the fishing industry in Alaska, the legislature of Alaska passed the act whose validity is here assailed.

We have seen by the Binns case that Congress when imposing a license tax system on businesses in Alaska, was not fettered by the constitutional prohibition as to uniformity. It must be conceded that Congress had plenary power over the Territory—That is, that it could legislate on all rightful subjects of legislation not prohibited by the national constitution. This power it [12] had, not so much from its constitutional power to make rules and regulations for the Government of the Territory, as from its inherent power arising from the ownership of the *res.* Having this power, Congress certainly had the power to confer it upon the legislature. It is true that the powers of that legislature are limited by the act defining those powers and that in this respect a territorial legislature differs from State legislatures; that is to say, the Organic Act of a Territory if a grant of specific powers and not a reservation of specific powers.

Congress, when implanting this new jurisdiction in Alaska, expressly provided that the power of the Alaska legislature

> "shall extend to all rightful subjects of legislation not inconsistent with the laws of the

United States, but it shall not, etc.,"

then follow exceptions too numerous to mention,—more than have obtained in the case of any other territory,—well nigh emasculating the original grant, and causing it to "speak the word of promise to the ear and break it to the hope." However, of its pristine vigor there is left enough to justify the imposition of license taxes and property taxes. Such power finds its warrant in the principle that unless a power is forbidden to our Legislature the latter possesses the power—"provided it be a rightful subject of legislation." That is to say, Congress, ordaining for this Territory an Organic Act, does a thing for the Territory which in its nature but not in its extent, is similar, analogous, to what the people of a state do when they adopt a constitution for the State.

> "The legislative power to be exercised by the territorial legislature is the legislative power of the territory, not that of the United States. Both states and territories, in a certain sense, derive their existence from the legislation of Congress, but the jurisdiction and authority exercised, either by a state or territory, is that of a state or territory, and not that of Congress. Territorial statutes have a distinct and well-defined character of their own. The people of a territory, when authorized to form a territorial government, are vested with a qualified sovereignty. Congress may limit their powers, and may annul their enactments, but, subject to these limitations, the territory is a government.

> Its laws, [13] unless set aside by Congress or the courts, are the laws of the territory; they are not laws of the United States, within the ordinary meaning of those terms; certainly not in the sense that the acts of Congress, approved by the president, are laws of the United States." (16 Fed. 715.)

This being true, the inquiries are these:

(a) When the legislature imposed this license tax, was it exercising power over a rightful subject of legislation? If it was not so exercising power, the enactment must fall; if, however, it was so exercising power, the enactment must stand, unless it violates some other provision of the constitution, (Organic Act.)

That the power to raise revenue by levying a license tax on business pursuits is "a rightful subject of legislation" will hardly be denied.

25 Cyc. p. 599, Sec. 3, and cases cited in Note 16.

(b) Pursuing the argument, then: Such power, being a rightful subject of legislation, exists in the legislature of this Territory unless there is some provision in the Organic Act which negatives the power. If there is any such provision, where is it to be found?

Counsel for defendant affects to find it in that provision of the Organic Act which declares that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and assessments shall be according to the value thereof. No taxes shall be levied for Territorial purposes in excess of one per centum upon the

assessed valuation of property therein any one year."

If this uniformity requirement applied to anything except direct property taxes the argument might prevail—but that in fact it does apply exclusively to direct property taxes and to nothing else has been decided so often as to be beyond cavil.

25 Cyc. p. 605–6, and cases cited.

"The constitutions of many of the states contain the requirement that taxation shall be equal and uniform, that all property [14] in the state shall be taxed in proportion to its value, that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, or that the legislature shall provide for an equal and uniform rate of assessment and taxation; and in the face of such provisions a tax law which violates the prescribed rule of equality and uniformity is invalid, although there is sufficient difference in the wording of the different provisions to account for some lack of uniformity in the decisions as to what constitutes a violation of their requirements. The requirement does not apply to every species of taxation, and does not restrict the legislature to the levying of taxes upon property alone. The restriction relates only to the rate or amount of taxation and its incidence upon taxable persons and property, and does not limit the legislature in regulating the mode of levying and collecting the taxes imposed, and it also relates only to property within

the state, and neither the statutes of another state nor the action of its taxing officers can affect the question. In the absence of such a constitutional requirement it is not essential to the validity of taxation that it shall be equal and uniform, and in such a case a tax law cannot be declared unconstitutional merely because it operates unequally, unjustly, or oppressively.

The requirement of equality and uniformity applies only to taxes in the proper sense of the word, levied with the object of raising revenue for general purposes, and not to such as are of an extraordinary and exceptional kind, or to local assessments for improvements levied upon property specially benefited thereby, or to other burdens, charges, or impositions which are not properly speaking taxes; and further, such a constitutional provision is to be restricted to taxes on property, as distinguished from such as are levied on occupations, business, or franchises, and on inheritances and successions, and as distinguished also from exactions imposed in the exercise of the police power rather than that of taxation.

The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits, nor prevent the legislature from taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons pursuing the same avocation, or that if

those following the same calling are divided into classes for the purposes of taxation, the basis of classification shall be reasonable and founded on a real distinction, and not merely arbitrary or capricious. To this extent, also, and no further, the principle applies to license fees or taxes imposed under the police power or for the better regulation of occupations supposed to have an important public aspect."

(37 Cyc., p. 729–33.)

It is urged that the legislature has only such powers of taxation as is conferred by section 9 of the Organic Act. But this is a mistake. It is true that that section expresses the limit of its powers as to direct property taxation, but it is elsewhere granted the express power to raise revenue by license taxes (C. L. 1913, S. 410), and as a matter of fact that is the only method of taxation which the legislature has adopted. **[15]**

It is said that the system of taxation adopted is the exercise of special and not general legislation. This position is untenable. See Codlin v. Kohlhausen, 58 P. R. 499.

It is said that there has been no assessment, but

"The cardinal rule in taxation that whenever a tax is to be fixed by assessment the due assessment must precede any valid claim of such tax does not apply to license taxes, except where the statute expressly so provides, or where the tax is according to value, or depends upon the ascertainment of person or value by some designated official."

(25 Cyc., p. 628.)

It is said that the fact that a lien on the property is reserved for the taxes shows that this is a property tax, but

> "In order to accomplish the certain collection of license taxes, the statute may declare that such taxes shall be a lien on the property assessed and entitled to be paid in preference to all mortgages and incumbrances."

(Cyc., p. 628.)

It is said there is no such business or line of business as fish-traps and that that fact, together with the fact that dummy traps are included is proof positive that this is a property tax pure and simply—a tax on the *res* and not on the business. A dummy trap is a sham trap not used for fishing, but designed simply to squat on and hold a trap location. None of the traps in question are dummy traps. The complaint seeks to recover the license tax from "fishing" traps, and if the tax on them is valid, it would not matter that the tax on dummy traps is invalid.

It is true there is no such business or line of business as fish-traps, but this is a mere "inaptitude of expression,"—The meaning is plain when the language is read in connection with that knowledge of the fishing business (one of the main enterprises of Alaska) common to all our people and of which the legislature will not be considered ignorant and of which the Court will take judicial notice. The legislature meant that whoever conducts the business of fishing by means of fish-traps must pay the license required by law. Although taxation statutes are to [16] be strictly construed

against the taxing power, yet they are to be construed to mean something, if possible, and are not to have their vitality frittered away by technical refinements.

Cyc.

The demurrer in each case will be overruled.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Aug. 11, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

[Endorsed]: No. 1326–A. In the United States District Court for the District of Alaska, Division No. One. The Territory of Alaska, Plaintiff vs. Hoonah Packing Co., a Corporation, Defendant. [17]

In the District Court for Alaska, Division Number One, at Juneau.

No. 1326–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

HOONAH PACKING CO., a Corporation,
Defendant.

Order Overruling Demurrer.

This cause came on regularly to be heard upon the demurrer of the defendant to the plaintiff's complaint. Messrs. Hellenthal & Hellenthal and Mr. Z. R. Cheney, appearing for said demurrer, and Mr.

Cobb, *contra,* and the Court having heard said demurrer, and the argument of counsel thereon, and being fully advised in the premises, finds the law for the plaintiff.

It is therefore considered by the Court, and it is so ordered, adjudged and decreed, that said demurrer be and the same is hereby in all things overruled; and upon application of counsel for defendants fifteen days are allowed within which to answer.

Dated August 11th, 1915.

ROBERT W. JENNINGS,
Judge.

Entered Court Journal No. L, page 58.

Filed in the District Court, District of Alaska, First Division. Aug. 11, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [18]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Case No. 1326–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,
Defendant.

Amended Answer.

Comes now the defendant and for answer to the complaint of the plaintiff herein, admits, denies and alleges as follows:

I.

The defendant admits that it is a corporation duly

incorporated and owning property in the Territory of Alaska, and engaged in the fishing business in said Territory, as said fish business is hereinafter more particularly described.

II.

Defendant denies that during the month of June, 1915, or at any other time, it was engaged in prosecuting, or attempting to prosecute, the business of fishing by means or fish-traps, situate in the waters of Alaska or elsewhere, except as hereinafter stated and in this connection the defendant avers:

That it is the owner of a salmon cannery, situate near Hoonah in Southeastern Alaska, and that it is engaged in catching, packing and canning salmon; that in connection with the operation of such cannery it catches, packs, cans and ships salmon; that it is the owner of eleven (11) fish-traps, situate [19] in the waters of Southeastern Alaska, and that each and all of said fish-traps are appliances used by it in connection with its operation of said cannery and that said traps and all of them are part of the cannery property used exclusively for the purpose of catching fish to be canned in the defendant's said cannery.

That the defendant is not engaged in the business of operating fish-traps, or in the business of fishing by means of fish-traps; that it does not sell the fish caught in any of its said traps until the same have been canned at its said cannery and makes no use whatsoever of said fish-traps, except in the operation of its said cannery.

That it has complied with all the provisions of chapter three, title seven of the Compiled Laws of

Alaska, relating to fish and fisheries, including the provisions of sections 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, §275 and §275–A, and has paid license taxes on its business and output as by said act of Congress required, and has in all respects complied therewith; that the taxes and licenses have been so paid by defendant and accepted by the United States in lieu of all other license fees and taxes on their said business and output.

III.

Answering paragraph number three of plaintiff's complaint, defendant denies that by an act of the Alaska legislature, approved April 29, 1915, entitled "An act to establish a system of taxation, create revenue, and provide for collection thereof, for the Territory of Alaska, and for other purposes," approved May 1, 1913, and declaring an [20] emergency," a tax of one hundred dollars ($100) was imposed upon each and every fish-trap, which said tax, by the terms of said act, became due and payable on the 1st day of July, 1915.

Further answering said paragraph, defendant alleges that on April 30, 1915, the persons who composed the membership of the Alaska territorial legislature, met in the Legislative Assembly Hall at Juneau, Alaska, and then and there acting unlawfully and without authority so to do, attempted and pretended as pass an act imposing a tax of one hundred dollars ($100) upon each and every fish-trap in the Territory of Alaska, which said act is the act mentioned and set forth in paragraph number

three of the plaintiff's complaint, and which plaintiff alleges was passed on April 29th 1915.

That at the time of the attempted passage of said act by the persons above mentioned, the regular session of the legislative assembly, beginning March 1, 1915, had long since expired; that said legislative assembly had been in continuous session for more than sixty (60) days prior to April 30th, 1915, and said assembly had not been called or convened in extraordinary session by a proclamation of the Governor of the Territory, as provided by section six of the Organic Act of the Territory of Alaska, entitled, "An act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon and for other purposes." [21]

Further answering said paragraph, defendant alleges that said act so attempted to be passed as aforesaid is invalid for that it alters, amends, modifies and repeals the fish laws passed by the Congress of the United States prior to the adoption of the Organic Act and in force at the time said act was adopted all of which is contrary to the provisions of section three of said Organic Act.

Further answering said paragraph, defendant alleges that the purported license tax sought to be collected in this action is not a license but a tax and is sought to be collected in violation of the provisions of the Organic Act of the Territory of Alaska in this that the act is a revenue measure pure and simple, and that the licenses sought to be collected are not sought to be collected for the purpose of regulation, but for the purpose of taxation only;

that the amount imposed is far in excess of the amount required to issue the license, to regulate and inspect the thing sought to be licensed and to do such other things as might be done by the Territory under its police powers; and that the express object of the act is not regulation but taxation, and as such is in violation of the provisions of the Organic Act, which requires, "that all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessment shall be according to the actual value thereof. No taxes shall be levied for territorial purposes in excess of one per centum upon the assessed valuation of property within the Territory in any one year." **[22]**

That the tax attempted to be imposed upon fish-traps in the Territory is not assessed according to the actual value of said fish-traps is levied without reference as to whether it is in excess of one per centum upon the assessed valuation of the property and without any assessment whatsoever having been made prior to the commencement of this action; that said tax of one hundred dollars ($100) exceeds one per centum upon the actual value of the traps taxed; that the act under which said taxes are assessed is contrary to the provisions of the act of Congress of July 30, 1886, for the reason that the same is a local or special law instead of a general law.

Answering paragraph number four of plaintiff's complaint defendant admits that during the months of June and July 1915, it has operated eleven (11)

fish-traps described in the complaint in the manner above set forth in paragraph two of this answer, and that it has failed, neglected, and refused to pay said tax or any part thereof, but defendant denies all and singular the remaining allegations in said paragraph contained.

WHEREFORE, defendant prays that plaintiff take nothing by its action, and that defendant recover its costs and disbursements herein expended.

Z. R. CHENEY,
Attorney for Defendant. **[23]**

United States of America,
Territory of Alaska,—ss.

Z. R. Cheney, being first duly sworn, on oath deposes and says:

I am the attorney for the defendant in the above-entitled action, have read the foregoing answer, know the contents thereof, and the same is true as I verily believe.

Z. R. CHENEY,

Subscribed and sworn to before me this 23d day of September, A. D. 1915.

[Notarial Seal] A. H. ZIEGLER,
Notary Public in and for the Territory of Alaska.

My commission expires July 3, 1917.

Due service of the within Amended Answer is hereby admitted this 24th day of September A. D. 1915.

J. H. COBB,
Attorney for plaintiff.

Filed in the District Court, District of Alaska, First Division, Sep. 25, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy. [24]

In the District Court for Alaska, Division Number One, at Juneau.

No. 1326–A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,

Defendant.

Demurrer to Amended Answer.

Now comes the plaintiff, by J. H. Cobb, Chief Counsel for the Territory of Alaska, and demurs to the amended answer of the defendant, and alleges that the same constitutes no defense to the plaintiff's complaint in this:

1st. That the denial contained in paragraph II of said amended answer as limited and explained is merely a denial that defendant sells the fish taken in the traps it is operating, but instead cans the same in its own canneries.

2d. It affirmatively appears from said amended answer that defendant did operate the eleven traps mentioned in the complaint and took fish therein.

3d. The affirmative facts plead as a defense to said complaint do not in law constitute any defense to the same.

Of all of which plaintiff prays judgment of the Court.

J. H. COBB,
Chief Counsel for the Territory of Alaska.

Filed in the District Court, District of Alaska, First Division. Sep. 25, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy. [25]

[Order Overruling Demurrer to Amended Answer.]

No. 1326–A.

THE TERRITORY OF ALASKA,

vs.

HOONAH PACKING COMPANY.

[Overruling Demurrer to Amended Answer].

The demurrer of plaintiff to the amended answer is overruled.

Filed in the District Court, District of Alaska, First Division. Nov. 1, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [26]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1326–A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

HOONAH PACKING CO., a Corporation,

Defendant.

Reply to Amended Answer.

Now comes the Territory of Alaska by its chief counsel and for reply to the amended answer of the defendant alleges:

I.

Referring to paragraph 3, it admits that the defendant, during the months of June and July operated eleven fish-traps described in the complaint in the manner set forth in paragraph 2 of said answer, and further admits that the defendant has failed, neglected and refused to pay the said tax or any part thereof, but it denies all and singular the other remaining allegations in said paragraph contained.

J. H. COBB,
Chief Counsel.

United States of America,
Territory of Alaska,—ss.

J. H. Cobb being first duly sworn, deposes and says: I am the chief counsel for the Territory of Alaska. The matters and things set forth in the above and foregoing reply are true as I verily believe.

J. H. COBB.

Subscribed and sworn to before me this 4th day of November, 1915.

[Notarial Seal] E. L. COBB,
Notary Public in and for Alaska.

My commission expires Dec. 3, 1918.

Service of the above and foregoing reply admitted this the 4th day of November, 1915.

CHENEY & ZIEGLER,
By R. E. P.
Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division. Nov. 6, 1915. J. W. Bell, Clerk. By L. E. Spray, Deputy. **[27]**

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1326–A

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation.
Defendant.

Stipulation [of Facts].

It is hereby stipulated and agreed by and between the plaintiff and defendant, by their respective counsel, that this case shall be tried upon the following agreed facts:

I.

The defendant, Hoonah Packing Company, is a corporation duly incorporated and owing property and doing business in the Territory of Alaska.

II.

The said defendant is the owner of 11 fish-traps situate within the waters of Southeastern Alaska, which said traps and each and all of them *it* operated

during the fish season of 1915 to wit, during the months of June, July and August, taking fish therein.

III.

That none of the fish taken by the defendant in any one its said fish-traps operated by it as aforesaid, was sold by the defendant prior to being canned, but all the fish so caught were utilized by the defendant in connection with the operation of certain canning plants also owned by it [28] in which said fish were canned and thereafter sold as canned salmon, and the defendant has not otherwise engaged in the fish-trap business.

IV.

The defendant has complied with all the provisions of chapter 3, title 7, of the Compiled Laws of the Territory of Alaska, relating to fish and fisheries, including the provisions of Sections 259 to 275–A, inclusive; also with all rules and regulations, respecting salmon fisheries in Alaska, made and established by the Secretary of Commerce & Labor, pursuant to section 269 of said act, and has paid the license tax provided for by said act.

V.

That no assessment has ever been made by the plaintiff, its officers, agents or employees, upon all or any one of the 11 fish-traps described in the complaint.

VI.

That the Territory of Alaska has passed no law providing for the inspection, regulation of fish-traps in Alaskan Waters, with the exception of the act of April 29, 1915, under which act this suit is brought.

VII.

Some of the 11 traps belonging to the defendant, upon which this tax is claimed to be due, are worth upwards of $10,000, and some are worth not to exceed $1,000.

VIII.

The second session of the legislature which passed the act which forms the basis of this action, to wit, chapter 76, Session Laws of Alaska, 1915, convened on the 1st [29] day of March, 1915, at 12 o'clock noon; that on the 29th day of April, 1915, said legislature adjourned, *sine die,* at 12 o'clock midnight, according to the official time-pieces of said legislature, that is to say, the clocks hanging in the halls of the two houses of the legislature were stopped or turned back by the sergeant-at-arms just prior to the hour of 12 o'clock of April 29, 1915, and thereafter between the hours of 3 and 4 o'clock A. M., sun time, of April 30, 1915, while the clocks in said halls of the legislature still indicated prior to midnight being stopped or turned back as aforesaid, the said act, namely chapter 76 of the Session Laws of Alaska, 1915, was finally passed by both Houses of the legislature and approved by the Governor; and was enrolled and filed in the office of the Secretary of the State for the Territory as it now appears in the printed volume of the Session Laws of Alaska, 1915, chapter 76; that the Governor of the Territory of Alaska did not call an extra session to pass said act.

IX.

It is further stipulated that a real controversy

in good faith exists between the Territory and the defendant as to the meaning, scope and validity of chapter 76 of the Session Laws of 1915, approved April 29, 1915, and this agreement and stipulation as to the facts is made for the purpose of settling such controversy without the necessity, trouble and expense of introducing evidence; that the Territory waives all claim for penalties provided in said Law, and **[30]** asks judgment only for the amount of the tax, and legal interest from July 1, 1915.

It is agreed that this case shall be tried upon the record, including the complaint, answer, reply and this stipulation.

It is further agreed that the foregoing stipulation of facts are subject to objection from either party as to their incompetency, irrelevancy or immateriality the same as might be raised on the trial to evidence tending to prove such facts.

It is further stipulated that the parties hereto make the following legal contentions:

First. It is contended by the plaintiff that the said chapter 76 of the Session Laws of 1915 is a valid law, and that thereunder the plaintiff is entitled to have and recover of and from the defendant the sum of $1,100, with interest at 8% thereon from and after July 1, 1915;

It is contended on the part of the defendant that it is not indebted to the plaintiff in any sum whatsoever, for the reasons (1) that it does not come within the provisions of chapter 76 of the Session Laws of 1915; and (2) because the said last mentioned act and especially those provisions relied upon as the basis of

this action is and are void and invalid for the following reasons, viz.:

(a) Because that portion of the act of April 29, 1915, imposing a tax of $100 on each fish-trap in Alaska, is in violation of the provisions contained in [31] sections 3 and 9 of the act of Congress, approved August 24, 1912, known as the Organic Act of Alaska.

(b) The legislature is limited in its grant of power from Congress to provide for the assessment, levying and collection of taxes in Alaska, and power to act beyond the grant is not an attribute of sovereignty in a territory.

(c) All taxation of real and personal property in Alaska, under laws passed by the legislature for the purpose of raising revenue for territorial purposes under the name of taxes, excises, licenses or any other name, must be imposed according to the actual value of the property taxed.

(d) That the act in question is void for the reason that it was passed after midnight of April 29, 1915.

J. H. COBB,
Chief Counsel for the Territory of Alaska.
CHENEY & ZIEGLER,
Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division. Nov. 20, 1915. J. W. Bell, Clerk. By ————, Deputy. [32]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1326–A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,

Defendant.

Amendment to Stipulation [of Facts].

The parties hereto agree that the stipulation heretofore filed herein and on which this case is to be tried shall be, and the same is hereby, amended by adding thereto the following clause:

"If the Court shall find, under the law, that judgment should go for plaintiff, said judgment shall be for the sum of $1,100, with interest thereon from July 1, 1915; from which judgment a writ of error or appeal may be prosecuted as provided by law."

Dated this 20th day of November, 1915.

J. H. COBB,
Attorney for Plaintiff.
CHENEY & ZIEGLER,
Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division. Nov. 20, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy. [33]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1326–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,
Defendant.

Stipulation [Waiving Trial by Jury].

It is hereby stipulated by and between the parties hereto by their respective counsel that a jury herein is expressly waived and said cause is to be tried by the Court upon the pleadings and stipulation of facts on file herein.

J. H. COBB,
Chief Counsel for the Territory of Alaska.
Z. R. CHENEY,
Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division. Nov. 29, 1915. J. W. Bell, Clerk. By ————, Deputy. [34]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1325–A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

No. 1326–A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,

Defendant.

Opinion.

In its opinion rendered on the occasion of overruling the demurrer to the complaint in this cause, the Court decided in favor of plaintiff all the questions now presented (at the trial *all* hereof) except

1. The question as to whether or not the term of the legislature had expired when chapter 76, Laws of the Alaska legislature of 1915 was passed;

2. The question as to whether or not the catching of fish to be canned and then sold is "engaging in the fishing business;

and those two questions will now be considered.

(1) The Organic Act (sec. 413, Compiled Laws of Alaska, 1913) provides: [35]

> "That the legislature of Alaska shall convene at the capitol at the city of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March every two years thereafter; but the said legislature shall not continue in session longer than sixty days in any two years unless again convened in extraordinary session by a proclamation of the Governor."

By the stipulation of facts it appears that the legis-

lature convened on the 1st day of March, 1915, at 12 o'clock noon. By the Organic Act it is not to continue in session longer than 60 days in any two years. By the stipulation it also appears that the act in question "was finally passed by both houses of the legislature and approved by the Governor and was enrolled and filed in the office of the Secretary of State for the Territory as it now appears in the printed volume of the Session Laws of Alaska for 1915—Chapter 76."

Conceding for the sake of the argument only, that that clause of the stipulation does not settle the matter and preclude any further inquiry, this question arises: At what time did the 60 days mentioned in the Organic Act expire?

There seems to be a conflict of authorities as to whether or not Sundays and holidays are to be included in counting the sixty days. The cases of Cheyney vs. Smith, 23 P. R. 680 (Ariz.), of Moog vs. Randolph, 77 Ala. 608, and some others, hold to the negative: In the dissenting opinion in the Arizona case some authorities holding to the affirmative are collected; and in an opinion dated March 16, 1889, given by Attorney General Miller to the Secretary of the Interior that official distinctly held that Sundays and holidays are to be counted as days of the session; (Vol. 19, p. 259, Opinions of Attorneys General); but, however this may be, the Alaska legislature of 1915, convened at noon on the 1st day of March, 1915, and adjourned *sine die* "between 3 and 4 o'clock A. M. (sun time), on April 30, 1915, (see stipulation); so that even counting Sundays and holidays, it did not

continue in session longer than 60 days; for the full period of sixty days did not expire until noon of the 60th day— [36] that is noon of April 30, 1915.

White v. Hinton, 17 L. R. A. 66 (Wyo.).

As to the second question: Defendant contends that the catching of the fish is a mere adjunct of the canning business, without which the latter cannot or does not exist; that it is not engaged in the business of fishing but in the business of canning, and that by act of Congress approved June 26, 1906 (34 Stats. at Large, 478), it was provided that the tax therein prescribed for carrying on the business of canning shall be "in lieu of all other license fees and taxes therefor and thereon." The argument, if carried out logically, would result in the proposition that Congress itself having said that the tax provided in the act shall be in lieu of all other license fees and taxes, could not by a later law impose for the future a license larger in amount than that which was imposed by the former act, or taxing the different branches or instrumentalities of the canning business. Such a proposition is untenable, for the power of Congress is plenary in the matter. What Congress could do in this matter the territorial legislature can do, for the power of the latter extends to "all rightful subjects of legislation" not forbidden by the Organic Act (Organic Act, Sec. 416), and "except as herein provided, all laws now in force in Alaska shall continue in full force and effect until altered, amended or repealed by Congress or by the legislature" (Organic Act, C. L. 410); and "Provided further: That this provision shall not operate to prevent the legis-

lature from imposing other and additional taxes or licenses." As Congress, then, could provide that all persons catching fish for canning shall pay a certain license tax, and all persons canning the caught fish shall pay an additional license tax, so the legislature, also, may provide the same thing. Now, that is just what the legislature has done by the act in question: It has provided that all persons in the business or line of business of catching fish by means of [37] fish-traps (whether or not they catch the fish for canning purposes) shall pay $100, and all persons canning the caught fish (whether the fish are caught in traps or nets or seines) shall pay 4 cents per case, etc.—in other words, a license tax for catching and a license tax for canning.

Findings and judgment for plaintiff as per stipulation.

_____,

Judge.

Filed in the District Court, District of Alaska, First Division. Nov. 30, 1915. J. W. Bell, Clerk. By _____, Deputy. [38]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1326–A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,

Defendant.

Judgment.

This cause came on regularly for trial upon the complaint, answer and reply; and thereupon came the plaintiff by Mr. J. H. Cobb, and the defendant by Mr. Z. R. Cheney, and all parties announced ready for trial, and filed a stipulation waiving a jury and also filed a stipulation in writing as to the facts herein from which stipulation and the admission in the pleadings, the Court makes the following FINDINGS OF FACT:

I.

The defendant, Hoonah Packing Company, is a corporation duly incorporated and owning property and doing business in the Territory of Alaska.

II.

The said defendant is the owner of 11 fish-traps situate within the waters of Southeastern Alaska, which said traps and each of them it operated during the fishing season of 1915; during the months of June, July and August, taking fish therein.

III.

That none of the fish taken by the defendant [39] in any one of its said fish-traps operated by it as aforesaid, was sold by the defendant prior to being canned, but all the fish so caught were utilized by the defendant in connection with the operation of certain canning plants owned by it in which said fish were canned and thereafter sold as canned salmon, and the defendant has not otherwise engaged in the fish-trap business.

IV.

The defendant has complied with all the provisions of chapter 3, title 7, of the Compiled Laws of the Territory of Alaska, relating to fish and fisheries, including the provisions of sections 259 to 275–A, inclusive; also with all rules and regulations respecting salmon fisheries in Alaska, made and established by the Secretary of Commerce and Labor, pursuant to section 269 of said act, and has paid the license tax provided for by said act.

V.

That no assessment has ever been made by the plaintiff, its officers, agents or employees, upon all or any one of the 11 fish-traps described in the complaint.

VI

That the Territory of Alaska has passed no law providing for the inspection, regulation or taxation of fish-traps in Alaskan waters, with the exception of the act of April 29th, 1915, under which act this suit is brought.

VII.

Some of the 11 traps belonging to the defendant, upon which this tax is claimed to be due, are worth upwards of $10,000, and some are worth not to exceed $1,000. [40]

VIII.

The second session of the legislature which passed the act which forms the basis of this action, to wit, chapter 76, Session Laws of Alaska 1915, convened on the 1st day of March, 1915, at 12 o'clock noon; that on the 29th day of April, 1915, said legislature

adjourned *sine die,* at 12 o'clock midnight, according to the official time pieces of the said legislature, that is to say the clocks hanging in the halls of the two houses of the legislature were stopped or turned back by the sergeant-at-arms just prior to the hour of 12 o'clock midnight of April 29th, 1915, and thereafter, between the hours of 3 and 4 o'clock A. M., sun time, of April 30th, 1915, while the clocks in said halls of the legislature still indicated prior to midnight, being stopped or turned back as aforesaid, the said act, namely chapter 76, of the Session Laws of Alaska 1915, was finally passed by both Houses of the legislature and approved by the Governor; and was enrolled and filed in the office of the Secretary of State for the Territory as it now appears in the printed volume of the Session Laws of Alaska 1915, chapter 76; that the Governor of the Territory of Alaska did not call an extra session to pass said act.

IX.

The defendant has not paid the said tax or any part thereof.

And it was further stipulated in writing that "if the Court shall find under the law that judgment should go for the plaintiff, said judgment shall be for the sum of Eleven Hundred Dollars ($1,100) with interest thereon from July 1st, 1915, from which judgment a writ of error or appeal may be prosecuted as provided by law." [41]

From the above and foregoing facts so stipulated to and found by the Court, the Court concludes as a matter of law that the plaintiff is entitled to judg-

ment against the defendant for the sum of Eleven Hundred and Thirty-six Dollars ($1,136) and all costs, to which ruling of the Court the defendant then and there excepted.

IT IS THEREFORE CONSIDERED BY THE COURT, and so ordered and adjudged that the plaintiff, the Territory of Alaska, do have and recover of and from the defendant, Hoonah Packing Company, a Corporation, the sum of Eleven Hundred and Thirty-Six dollars ($1,136) with interest thereon from the date hereof at the rate of eight per cent per annum, and all costs herein incurred, for all of which let execution issue. Defendant is allowed thirty days within which to file proposed bill of exceptions.

Dated this 1st day of December, 1915.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 2, 1915. J. W. Bell, Clerk. By L. E. Spray, Deputy. [42]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1326—A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Comes now the Hoonah Packing Company, a corporation, defendant above named, by its attorneys, Messrs. Cheney & Ziegler, and assigns the following errors committed by the Court in making its conclusions of law, and in the rendition of the judgment in this cause, upon which errors it will rely in the Appellate Court.

I.

The Court erred in overruling the defendant's demurrer to the plaintiff's complaint, and in entering its order therein on August 11, 1915.

II.

The Court erred in holding, as a matter of law, that the plaintiff was entitled to judgment against the defendant for the sum of $1,136, for the following reasons, to wit:

(a) Because the facts stipulated and agreed to between the plaintiff and defendant show that the defendant has not come within the provisions of chapter 76 of the Session Laws of 1915, the same being the act of April 29, 1915.

(b) Because the last-mentioned act, and especially those provisions relied upon as the basis of this action is and are void and invalid:

First. Because that portion of the act of April 29, [43] 1915, imposing a tax of $100 on each fish-trap in Alaska is in violation of the provisions contained in sections 3 and 9 of the act of Congress, approved April 24, 1912, entitled: "An act to create a legislative assembly in the Territory of Alaska,

to confer legislative power thereon, and for other purposes," which act is known as the Organic Act of Alaska.

Second. The legislature is limited in its grant of power from Congress to provide for the assessment, levying and collection of taxes in Alaska, and power to act beyond the grant is not an attribute of sovereignty in a Territory.

Third. All taxation of real and personal property in Alaska, under laws passed by the legislature for the purpose of raising revenue for territorial purposes, whether under the name of taxes, excises, licenses, or any other name, must be imposed according to the actual value of the property taxed.

Fourth. Because the act of April 29, 1915, is a local or special act.

Fifth. Because the act in question was passed by the legislative assembly after the expiration of sixty days from the convening of the session in 1915.

III.

The Court erred in the rendition of its judgment filed December 2, 1915, for the same reasons set forth in the above and foregoing assignment of error Number II.

And for the said errors and others manifest of record herein, defendant and plaintiff in error prays that the said judgment be reversed and said cause remanded for new trial, and for such [44] other

orders as to the Court may seem meet and proper in the premises.

CHENEY & ZIEGLER,
Attorneys for Hoonah Packing Company, Defendant and Plaintiff in Error.

Filed in the District Court, District of Alaska, First Division. Dec. 6, 1915. J. W. Bell, Clerk. By ————, Deputy. [45]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1326—A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,
Defendant,

Petition for Writ of Error.

The Hoonah Packing Company, a corporation, defendant in the above-entitled case, feeling itself aggrieved by the findings of the Court and the judgment entered thereon on the 2d day of December, 1915, in the above-entitled cause, comes now by its attorneys, Messrs. Cheney & Ziegler, and petitions said Court for an order allowing the defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security

which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

CHENEY & ZIEGLER,
Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division. Dec. 6, 1915. J. W. Bell, Clerk. By ————, Deputy. [46]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1326—A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,
Defendant,

Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond.

At a stated time, to wit, on the 7th day of December, 1915, at a regular session of the District Court, held in the courtroom, in the city of Juneau, in said District, on said day. Present: The Honorable ROBERT W. JENNINGS, District Judge.

Upon motion of Messrs. Cheney & Ziegler, attor-

neys for defendant, based upon petition for writ of error and an assignment of errors heretofore duly filed herein, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein and herein filed on the 2d day of December, 1915.

It is further ordered that the defendant file a bond in the sum of $1,500, such bond when taken and approved by this Court and filed herein to operate as a supersedeas from and after the date of such filing.

Done in open court this 7 day of December, 1915.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 7, 1915. J. W. Bell, Clerk. By ————, Deputy. [47]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1326—A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,
Defendant,

Writ of Error.

United States of America,—ss.

The President of the United States of America to the Honorable Judge of the District Court for the Territory of Alaska, Division Number One: Greeting:

Because, in the record and proceedings, as also in the rendition of the Judgment of a plea which is in the District Court before you between the Territory of Alaska, plaintiff, vs. Hoonah Packing Company, a corporation, defendant, wherein was drawn in question the validity of statute of the Territory of Alaska, entitled: "An act to establish a system of taxation, create revenue, and provide for the collection thereof, for the Territory of Alaska, and for other purposes; and to amend an act entitled, 'An act to establish a system of taxation, create revenue, and provide for collection thereof for the Territory of Alaska, and for other purposes' approved May 1, 1913, and declaring an emergency" approved April 29, 1915, being chapter 76 of the Session Laws of Alaska, 1915, and wherein the decision was in favor of the validity of said act, a manifest error hath happened to the great prejudice and damage of the said defendant, Hoonah Packing Company, as is said and appears by the petition herein;

Now, Therefore, we being willing that error, if any hath been, should be duly corrected and full and speedy justice [48] be done to the parties aforesaid in this behalf, do command you, if judgment be

therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at the said place and said circuit on or before thirty days, from the date hereof, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors, which of right and according to the laws and customs of the United States should be done.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 11th day of December, 1915.

I attest my hand and the seal of the District Court for Alaska, Division Number One, at the clerk's office at Juneau, Alaska, on the day and year last above written.

JOHN W. BELL,
Clerk of the District Court for the Territory of Alaska.

By ————,
Deputy.

Allowed this 11th day of December, 1915.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 11, 1915. J. W. Bell, Clerk. By ———, Deputy. [49]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1326—A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,

Defendant,

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Hoonah Packing Company, a corporation, as principal, and Sam Hirsch and H. T. Tripp, as sureties, are held firmly bound unto the Territory of Alaska, plaintiff above named, in the sum of $1,500, to be paid to the said plaintiff, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally firmly by these presents.

Sealed with our seals this 10 day of December, 1915.

The condition of this obligation is such, that, Whereas, the above-named defendant, Hoonah Packing Company, a corporation, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause in the District Court for the Territory of Alaska, Division Number One;

Now, Therefore, if the above-named defendant shall prosecute said writ of error to effect, and answer all costs and damages, if it shall fail to make

good its plea, then this obligation shall be void; otherwise to remain in full force and effect. [50]

HOONAH PACKING COMPANY,
By CHENEY & ZIEGLER,
Its Attorneys of Record.
SIMON HIRSCH,
H. T. TRIPP,
Sureties.

Taken and acknowledged before me this 10th day of December, 1915.

[Notarial Seal] A. H. ZIEGLER,
Notary Public in and for the Territory of Alaska.

My commission expires July 3, 1917.

The above and forgoing bond is approved as to form, amount and sufficiency of sureties, and the same is to operate as a supersedeas from and after the filing thereof.

ROBERT W. JENNINGS,
Judge of the District Court.

OK.—COBB.

Filed in the District Court, District of Alaska First Division. Dec. 11 1915. J. W. Bell Clerk. By ————, Deputy. [51]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1326–A.

TERRITORY OF ALASKA,
Plaintiff,
vs.
HOONAH PACKING COMPANY, a Corporation,
Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States to the Territory of Alaska, Plaintiff, and to J. H. Cobb, Its Chief Counsel, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Fracisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court for Alaska, Division Number One, wherein the Hoonah Packing Company, a Corporation plaintiff and you are the defendant in error to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 11 day of December, 1915, and of the independence of the United States the one hundred and thirty-ninth.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 11, 1915. J. W. Bell, Clerk. By ————, Deputy. [52]

Service of the above and foregoing citation in error is hereby admitted to have been duly made at

Juneau, Alaska, this 11th day of December, 1915.

J. H. COBB,

Chief Counsel for the Territory of Alaska, the Defendant in Error. [53]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1326–A.

TERRITORY of ALASKA,

Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,

Defendant.

Praecipe [for Transcript of Record].

To the Clerk of the Above-entitled Court:

You will prepare a transcript of the record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the writ of error heretofore perfected to said court and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Complaint, July 7, 1915.
2. Defendant's Demurrer, July 21, 1915.
3. Memorandum Opinion, Aug. 11, 1915.
4. Order Overruling Demurrer, Aug. 11, 1915.
5. Amended Answer, Sept. 25, 1915.
6. Demurrer to Amended Answer, Sept. 25, 1915.
7. Order Overruling Demurrer to Amended Answer, Nov. 1, 1915.

8. Reply to Amended Answer, Nov. 6, 1915.
9. Stipulation of Facts, Nov. 20, 1915.
10. Amendments to Stipulation, Nov. 20, 1915.
11. Stipulation, Nov. 29, 1915.
12. Opinion, Nov. 30, 1915.
13. Judgment, Dec. 2, 1915. [54]
14. Assignment of Errors.
15. Petition for Writ of Error.
16. Order Allowing Writ of Error.
17. Writ of Error.
18. Supersedeas Bond.
19. Citation on Writ of Error.
20. Praecipe.

Said transcript to be prepared as required by law, and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

CHENEY & ZIEGLER,

Attorneys for Hoonah Packing Co. Defendant and Plaintiff in Error.

Filed in the District Court, District of Alaska, First Division. Dec. 11, 1915. J. W. Bell, Clerk. By ————, Deputy. [55]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1326–A.

TERRITORY of ALASKA,

Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,

Defendant.

United States of America,
Territory of Alaska,—ss.

I, J. W. Bell, Clerk of the District Court for the Territory of Alaska, Division Number One, hereby certify that the foregoing and hereto annexed fifty-five pages of typewritten matter, numbered from one to fifty-five inclusive, constitutes a full, true and correct copy of the record, and the whole thereof, as per the praecipe, of the plaintiff in error, on file herein and made a part hereof, in the cause wherein the Hoonah Packing Company, a Corporation, is plaintiff in error, and the Territory of Alaska, is defendant in error, No. 1326–A, as the same appears of record and on file in my office, and that the said record is by virtue of the writ of error and citation issued in this cause and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and the cost of preparation,

examination, and certificate, amounting to Twenty-Three and 40/100 Dollars, has been paid to me by counsel for plaintiff in error.

In Witness Whereof I have hereunto set my hand and the seal of the above-entitled court this 15th day of December, 1915.

[Seal] J. W. BELL,
Clerk of the District Court for the Territory of Alaska.

By ————,
Deputy. [56]

[Endorsed]: No. 2713. United States Circuit Court of Appeals for the Ninth Circuit. Hoonah Packing Company, a Corporation, Plaintiff in Error, vs. Territory of Alaska, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed December 22, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2713

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HOONAH PACKING COMPANY
(a corporation),
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Z. R. CHENEY,
Attorney for Plaintiff in Error.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

No. 2713

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HOONAH PACKING COMPANY
(a corporation),
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

The facts, as shown by the pleadings and stipulation, are, briefly stated, substantially as follows:

The Hoonah Packing Company, plaintiff in error, during the fishing season of 1915, owned and operated eleven fish-traps in the waters of Southeastern Alaska. These traps were operated in connection with the operation of the Company's salmon cannery located at Hoonah, Alaska. None of the fish caught in the traps were sold by the Company until the fish had been manufactured into a product known as canned salmon. The Company had a license from the Federal Government to operate its cannery, and had complied with all the laws,

rules and regulations passed or promulgated by the Federal Government relating to salmon fisheries in Alaska.

On April 29, 1915, the Alaska Territorial Legislature passed an Act imposing a tax of $100 annually on all fish-traps in Alaska.

No assessment was ever made by the Territory upon the fish-traps taxed under this Act.

The Territory has passed no laws providing for the inspection or regulation of fish-traps in the Territory.

Some of the Company's traps are worth $10,000, and some are worth not to exceed $1,000.

The Act providing for the tax in question was passed by the Legislature and approved by the Governor in the early morning of April 30, 1915.

The statutes involved in this appeal are the following:

> Act of Congress, March 3, 1899, as amended by Act of June 6, 1900, known as the "Occupation Tax Law";
>
> Act of June 26, 1906, relating to fish and fisheries;
>
> Act of August 24, 1912, known as the "Organic Act" of the Territory;
>
> Act of Legislature of Alaska, April 29, 1915, imposing a tax on fish traps.

All the foregoing Acts are set out in full in the printed record in the case entitled, "*Alaska Salmon Company v. The Territory of Alaska,* No. 2720" now pending in this Court. We deem it unneces-

sary to set out the entire statutes in this brief, but do desire to call the Court's especial attention to certain portions of these Acts, namely:

Act March 3, 1899, as amended by Act June 6, 1900 (Record, Cause No. 2720, pp. 54-55):

> "That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for and obtain license so to do from a district court or a subdivision thereof in said District, and pay for said license for the respective lines of business and trade as follows, to wit: * * *
>
> 'Fisheries: Salmon canneries, four cents per case; salmon salteries, ten cents per barrel; fish oil works, ten cents per barrel; fertilizer works, twenty cents per ton. * * *'"

Act June 26, 1906 (Record, Cause No. 2720, pp. 46-47).

> "An Act for the Protection and Regulation of the Fisheries of Alaska.
>
> Be it enacted, etc., That every person, company, or corporation carrying on the business of canning, curing, or preserving fish or manufacturing fish products within the territory known as Alaska, ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, or in any of the waters of Alaska over which the United States has jurisdiction, shall, *in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said business and output as follows: Canned salmon, four cents per case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds; fish oil, ten cents per barrel; fertilizer, twenty cents per ton.* The payment and collec-

tion of such license taxes shall be under and in accordance with the provisions of the Act of March third, eighteen hundred and ninety-nine, entitled 'An Act to define and punish crimes in the district of Alaska, and to provide a code of criminal procedure for the district', and amendments thereto. * * *'' (Italics ours.)

Act August 24, 1912 (Record, Cause No. 2720, pp. 23-24, 27-28, and 30):

''* * * Sec. 3. Constitution and laws of United States extended.—That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature; Provided, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes', approved January twenty-

seventh, nineteen hundred and five, and the several Acts amendatory thereof. Provided further, that this provision shall not operate to prevent the legislature from imposing other and additional taxes and licenses. * * *

Sec. 9. Legislative power—Limitations.—The legislative power of the Territory shall extend to all rightful subjects of legislation but not inconsistent with the Constitution and laws of the United States. * * * All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year. * * *"

Act April 29, 1915 (Record, Cause No. 2720, pp. 38-39):

"An Act to establish a system of taxation, create revenue, and provide for collection thereof, for the Territory of Alaska, and for other purposes; and to amend an Act entitled 'An Act to establish a system of taxation, create revenue, and provide for collection thereof for the Territory of Alaska, and for other purposes', approved May 1, 1913, and declaring an emergency.

Be it Enacted by the Legislature of the Territory of Alaska:

Section 1. That any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska shall apply for and obtain a license and pay for said license for the respective lines of business as follows: * * *

6th. Fisheries: Salmon canneries, four cents per case on King and Reds or Sockeye;

two cents per case on Medium Reds; one cent per case on all others.

7th. Salteries: Two and one-half cents per one hundred pounds on all fish salted or mild cured, except herring.

8th. *Fish Traps*: *Fixed or floating, one hundred dollars per annum, so called dummy traps included.* * * *" (Italics ours.)

Upon the trial in the District Court, the Territory was given judgment for the amount of the taxes, amounting with interest to $1136.00.

Specifications of Error.

Plaintiff in error has assigned as error the following (Record, pp. 50-51):

"I.

The Court erred in overruling the defendant's demurrer to the plaintiff's complaint, and in entering its order therein on August 11, 1915.

II.

The Court erred in holding, as a matter of law, that the plaintiff was entitled to judgment against the defendant for the sum of $1,136, for the following reasons, to wit:

(a) Because the facts stipulated and agreed to between the plaintiff and defendant show that the defendant has not come within the provisions of chapter 76 of the Session Laws of 1915, the same being the act of April 29, 1915.

(b) Because the last-mentioned act, and especially those provisions relied upon as the basis of this action is and are void and invalid:

First. Because that portion of the act of April 29, 1915, imposing a tax of $100 on each fish-trap in Alaska is in violation of the provisions contained in sections 3 and 9 of the act of Congress, approved April 24, 1912, entitled. 'An act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes', which act is known as the Organic Act of Alaska.

Second. The legislature is limited in its grant of power from Congress to provide for the assessment, levying and collection of taxes in Alaska, and power to act beyond the grant is not an attribute of sovereignty in a Territory.

Third. All taxation of real and personal property in Alaska, under laws passed by the legislature for the purpose of raising revenue for territorial purposes, whether under the name of taxes, excises, licenses, or any other name, must be imposed according to the actual value of the property taxed.

Fourth. Because the act of April 29, 1915, is a local or special act.

Fifth. Because the act in question was passed by the legislative assembly after the expiration of sixty days from the convening of the session in 1915.

III.

The Court erred in the rendition of its judgment filed December 2, 1915, for the same reasons set forth in the above and foregoing assignment of error Number II. * * *"

Argument.

The first question to be disposed of arises under Subdivision (a), Assignment of Error No. II, Rec-

ord p. 50. It is this: Conceding, for the sake of this argument, that the Legislature had the power to pass the Act imposing the tax of $100 on fish traps, does the plaintiff in error, under the admitted facts and pleadings, come within the terms of the law? It is alleged in the amended answer (Record, p. 27) and admitted in the reply (Record, p. 34) that each and all of the eleven traps owned and operated by the Company are part and parcel of the cannery property, and that they are appliances used by the Company in connection with its operation of said cannery; that the fish caught in said traps are not sold by the Company, but are all canned in the Company's said cannery; in other words, it is admitted that the fish trap is only one of the many appliances used by the Company in taking the fish needed for its cannery. Fish are caught in traps, seines, gill-nets, and by means of trolling lines from dories. The Legislature has named two of the appliances used by the Company in its fishing business and called the appliances occupations.

The farmer plows his land with a plow, rakes his hay with a rake, and harvests his grain with a harvester. Would the Legislature be justified in passing an Act similar to the Act of April 29, 1915, in which these words are contained:

Plows	$ 50.00	per annum
Rakes	50.00	" "
Harvesters	100.00	" " ?

The law here in question simply states:

Fish-traps ..... $100.00 per annum
Gill-nets ..... 1.00 " hundred fathoms.

In each case the appliances by which the citizen gathers his crop are named and taxed as an occupation. We contend that under the admitted facts contained in the record in this case, the plaintiff in error does not come within the spirit of the Act imposing the tax in question.

The next question is this: Is the Act of April 29, 1915, void and invalid for any of the reasons set forth in the assignment of errors herein?

The Act of the Legislature is void, for the reason that it constitutes an amendment of a law of the United States relating to fish and fisheries of Alaska.

The Organic Act provides that the authority granted to the Legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the fish laws of the United States.

The Act of June 26, 1906, is a fish law of the United States and was in force in Alaska on April 29, 1915.

The Act of June 26, 1906, provides for certain license taxes on the fish business and further that those license taxes shall be in lieu of all other license fees and taxes on the business and output of the canneries.

The tax on the fish-traps operated by the plaintiff in error is a tax on the business of the cannery.

The Agreed Statement of Facts shows that the plaintiff in error has paid all license taxes due the United States for the year 1914.

Section 3 of the Organic Act (Record Cause No. 2720, p. 23) provides as follows:

> "* * * that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature; Provided, That the authority herein granted to the Legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade. * * * Provided further, that this provision shall not operate to prevent the legislature from imposing other and additional taxes and licenses."

Under the above provision, it will be noted that the fish laws and the laws providing for taxes on business and trade are expressly mentioned as laws which the Legislature of Alaska had not power to alter, amend, modify or repeal. These words "fish" and "laws providing for taxes on business and trades" do not appear in the proviso which permits the imposition of other and additional taxes and licenses. The natural and logical interpretation is that Congress intended to confer power upon the Legislature to alter, amend, modify and repeal all existing laws except on those subjects

expressly mentioned as reserved to the United States Government.

> "* * * Words expressive of a particular intent incompatible with other words expressive of a general intent will be construed to make an exception, so that all parts of the act may have effect. * * * Where there is an act or provision which is general, and applicable actually or potentially to a multitude of subjects, and there is also another act or provision which is particular and applicable to one of these subjects, and inconsistent with the general act, they are not necessarily so inconsistent that both cannot stand, though contained in the same act, or though the general law were an independent enactment. The general act would operate according to its terms on all the subjects embraced therein, except the particular one which is the subject of the special act."
>
> *Lewis' Sutherland Statutory Construction,* Second Edition, Volume II, page 660;
>
> *Zickler v. Union Bank & T. Co.,* 104 Tenn. 277.

Unless the Act of April 29, 1915, repealed the Act of June 26, 1906, the first-mentioned Act is void.

> *Pacific Gas & Electric Co. v. Roberts,* 168 Cal. 420.

What is the nature of this imposition of $100 on fish-traps? Is it an excise, a property tax or a license? An excise is defined as an inland impost levied upon articles for manufacture or sale and also upon licenses to pursue certain trades or to deal in certain commodities. Taxes on employ-

ments are excises. *Cooley on Taxation, Third Edition,* Volume I, p. 31, where it is said:

> "*Taxes on Employments.* A tax on the privilege of carrying on a business or employment will commonly be imposed in the form of an excise tax on the license to pursue the employment; and this may be a specific sum, or a sum whose amount is regulated by the business done or income or profits earned. Sometimes small license fees are required, mainly for the expense of regulation; but in other cases substantial taxes are demanded, because the persons upon whom they are laid would otherwise escape taxation in the main, if not entirely. Instances of hawkers, peddlers, auctioneers, etc., will readily occur to the mind. The form of a license, though not a necessary, is a convenient, form for such a tax to assume, because it then becomes a condition to entering upon the business or employment and is collected without difculty. But it is equally competent to impose and collect the tax by the usual methods."

That this tax is an excise has been held in *Binns v. United States,* 194 U. S. 486, where this language is used:

> "We shall assume that the purpose of the license fees required by section 460 is the collection of revenue, *and that the license fees are excises within the constitutional sense of the terms.*" (Italics ours.)

If the tax in question is an excise, we contend that the law imposing it is void, for the reason that the Territory does not possess plenary power to lay excises; that this power is possessed only by the Congress of the United States. See *Talbott v. Silver*

Bow County, 139 U. S. 438. Congress did not delegate this power to the Territory of Alaska. The Honorable Judge Jennings, before whom this case was tried, holds that the power of Congress to lay excises was delegated to the Legislature by virtue of the clause "provided that this provision shall not operate to prevent the Legislature from imposing other and additional taxes and licenses" (Record p. 18).

We contend that Congress intended, by this provision, simply to give the Legislature power to levy taxes on property (such taxes to be laid according to ascertained value and not to exceed one per cent. on the value, according to provisions of Section 9 of the Organic Act) and also to license certain callings which require police regulation by the Territory, having in mind the limitations upon all such police power—that is to say, that such licenses should be governed by the rules as to reasonableness of amount, and that they should not exceed the cost of issuance and necessary expenses for the inspection and regulation of the business licensed.

That this Act is purely a revenue measure is clearly shown by its title: "An Act to establish a system of taxation, create revenue and provide for collection thereof."

Being a revenue measure it should be construed strictly.

Cooley on Taxation, Vol. 1, p. 456, 3 Ed.;
Rice v. U. S., 53 Fed. 910.

A license is a privilege to do an act or carry on a pursuit, the performance or transaction of which is forbidden without such special permission. A license tax is a tax imposed upon the privileged action or pursiut.

Cooley on Taxation, Third Ed., p. 1137;
Burch v. Savannah, 42 Ga. 596;
Reed v. Beall, 42 Miss. 472;
Cache County v. Jensen, 61 Pac. 303;
Merced v. Helm, 102 Cal. 159;
Kiowa v. Dunn, 40 Pac. 357.

Congress has power to lay excises upon certain commodities and callings, solely for the purpose of revenue, this power Congress could delegate to the Alaskan Legislature. But we contend that it is not reasonable to think that Congress ever intended to delegate to the Territory such arbitrary power to burden the citizens of Alaska with such obnoxious and iniquitous laws. Dr. Johnson, speaking of an excise tax, said it was "a hateful tax levied upon commodities"; and Blackstone, after mentioning certain articles which had been added to the list of those excised, said "a list which no friend to his country would wish to see further increased". Usually articles subjected to excises are liquors and tobacco and appropriately selected therefor on the ground that they are not a part of the essential food supply of the nation but are among its comforts and luxuries. Callings or occupations excised are usually similar in character, such as the liquor business. Such

laws have never been extended to cover wheat, cotton or corn.

The Territory of Alaska is here attempting to lay an excise on a legitimate, useful and beneficial business, one of the great food products of the country —a product which is beneficial to the health and adds to the wealth and happiness of a nation. A salmon swimming in the waters of the sea has no value. If he lives his allotted time and dies in his natural element, he has contributed nothing to the benefit of mankind. The moment he is taken from the sea, he becomes a thing of value—a useful article for food consumption.

A law which not only taxes the necessary food supply of a nation by taxing the output of the canneries, but goes to the extent of laying heavy excises upon the appliances and instrumentalities used in obtaining that food supply, is an obnoxious and iniquitous thing.

In *Ex parte Pfirrmann,* 134 Cal., page 148, the Court uses this language:

> "* * * Further than that, it may be said that the trend of our state policy at the present time looks toward a cessation of legislation which has for its purpose, the raising of revenue by the collection of direct taxes, under the guise of a license, as a condition precedent to the conduct of business. Such legislation seems to be considered an impolitic burden resting upon legitimate business, and a fine assessed upon commercial enterprise."

Counsel for defendant in error may say that fish and fisheries of Alaska belong to the citizens

of Alaska; that the citizens, therefore, have the right to deal with such things as they see fit. Nothing could be farther from the truth. The fish in the bays, inlets and tidal waters of the Territory belong to the nation at large. Even the tide lands, whereon are located the traps, and the seashore for a distance of sixty feet above the tide, whereon are located the canneries, belong exclusively to the United States, being expressly reserved to its use by Acts of Congress.

If this is not an excise but a property tax, it falls within the limitations mentioned in Section 9 of the Organic Act. Being subject to such limitations, it is void because, *first,* it is not levied according to value of the property; *second,* no assessment on the property was ever made; and, *third,* it exceeds one per cent. of the actual value of the property. (Stipulation, Paragraphs V and VII, Record, pp. 36 and 37.) This branch of the question requires no further argument or citation of authorities.

If the tax in question be considered as a license imposed under the police powers of the Territory, for the purpose of regulation, it is void because it is excessive. It is admitted in the stipulation (Paragraph VI, p. 36) that the Territory has made no attempt to regulate the business. Therefore, there can be no expense for regulation or inspection. The only expense connected with the whole matter, so far as the Territory of Alaska is concerned, is the cost of printing and issuing the paper denomi-

nated a license. There are about 300 fish-traps operated in the Territory of Alaska. That $30,000 is an excessive amount for the mere clerical work of issuing 300 licenses is obvious. The collection of this license by the Territory is for the purpose of revenue, and not for the purpose of police regulation. This is shown by the excessive amount of the tax.

The license fees which are sometimes required to be paid by those who follow particular employments are, when imposed for the purpose of revenue, taxes. *Cooley's Constitutional Limitations,* p. 611, Sixth Edition. The Act in question simply provides that persons or companies engaged in fishing in Alaska shall pay $100 per year on each trap. The Territory is not interested as to how the business shall be conducted, how the fish-traps shall be operated, whether they shall fish on Sunday or at any other time, or that the traps shall be placed in a salmon stream or in the ocean. The Legislators knew, when they passed the bill, that the entire regulation of the fish business in Alaska was exclusively in the hands of the Federal Government; that the Federal Government had imposed stringent rules and regulations as to the conduct of the business; that the Government was spending thousands of dollars annually in enforcing these regulations by means of patrol boats, fish agents, fish inspectors, fish hatcheries, etc. In determining whether or not a license is imposed in good faith, and as a police regulation, or whether it is intended

merely as a means for obtaining money, the Courts will take into consideration the question of whether or not the sovereign power imposing the license has made any attempt at regulation of the business licensed. In the case of *City of New York v. Second Avenue R. R. Co.,* 32 N. Y. 261, this language is used.

> "The plaintiffs must show, however, that the subject of the ordinance which they are seeking to enforce, is one over which they have authority to legislate, and that it is a regulation of police and internal government, and not the mere imposition of a duty or sum of money for the purposes of revenue. * * *
>
> Section 106 declares that 'each and every passenger railroad car, running in the city of New York, below 125th street, shall pay into the city treasury the sum of $50, annually, for a license, a certificate of such payment to be procured from the mayor, except the small one-horse passenger cars, which shall each pay the sum of $25 annually, for such license as aforesaid'. Section 2 declares that 'each certificate of payment of license shall be affixed to some conspicuous place in the car, that it may be inspected by the proper officer'. And section 3 prescribes the penalty for running a car without the proper certificate. That is all.
>
> There is nothing for the railroad corporations to do, but to pay to the mayor the sum of $50, annually, for each car, and receive in return a license or certificate that the money has been paid. The ordinance imposes no duties to be observed by the company or its servants, but the single act of paying the money. It prescribes no regulations in regard to the size, dimensions, comfort and cleanliness of the cars, the speed at which the same

shall be run, the manner of receiving and discharging passengers, their numbers and names, or the stations at which they shall stop. Regulations of police are regulations of internal or domestic government, forbidding some things, and enjoining the performance of others, for the security and protection, and to promote the happiness of the governed. The only act enjoined by the ordinance in question is the payment of the $50, and the only act which it forbids and prohibits is the running of the cars without the payment of the money. If the legislature should by law require every head of a family throughout the state to pay to the collector the sum of $20, and take his receipt therefor, it would be a fiscal measure, an expedient to replenish the treasury, not a regulation of police, prescribing a rule of action and conduct. So with this ordinance, call what it requires by the name of license or certificate of payment, or anything else, its primary, and indeed, only purpose is, to take from the company, under coercion of the penalty which it imposes, the sum of $50, annually, for each car run upon the road, for the benefit of the city.

The certificate which the company is to receive, upon payment being made, is called a license, in the ordinance. A license to do what? The ordinance does not say—and, indeed, it could not, with truth, say—a license or permission to employ the car in the transportation of passengers upon the road—for the absolute right to do that which had been not only required, but positively enjoined upon the company, by the stipulations of the grant of the 15th of December, 1852. It is in vain, therefore, to speak of it, or to treat it, as a license, or a regulation of police. It is the imposition of an annual tax upon the company, in derogation of its rights of property, and on

that account, is unlawful and void. The judgment of the supreme court should be affirmed, with costs."

Sunset Tel. & Tel. Co. v. City of Medford, 115 Fed. 202;

The Laundry License Case, 22 Fed. 701;

Flannigan v. Sierra County, 196 U. S. 553; Id. 122 Fed. 24.

With reference to the decision in the *Binns case,* 194 U. S. 486 it must be remembered that prior to March 3, 1899, not one dollar of taxes was paid by the citizens of the Territory of Alaska. There was no Territorial Legislature prior to that date, and Congress had not seen fit to pass any revenue measure for the Territory.

Justice Brewer, in rendering the opinion of the Court, mentioned the conditions that existed in the Territory (p. 495). Congress chose this method of raising revenue by an occupation tax as the most feasible way of producing revenue from the Territory. After the passage of the Act of March 3, 1899, the amendment of June 6, 1900, and the Act of June 26, 1906, various kinds of property of great value, excepting only the fisheries, still remained without taxation. Such was the situation August 24, 1912, when Congress passed the Organic Act. The men who framed this Act knew that much of the property in the Territory, such as horses, cattle and real property, was not reached by the occupation tax law. They desired to give the Legislature authority to tax this property. The power

was given in Section 9 of the Organic Act. The Legislature did not make use of its powers under Section 9, but attempted to usurp the powers of Congress by the passage of an excise law. In 1915 the same reasons did not exist for imposing excise taxes as had existed in 1899 when Congress passed the occupation tax law. Congress was then legislating for one of its possessions located thousands of miles from the seat of Government—a possession with no powers of self-government; no Legislature; sparsely populated; known only to a few hardy miners. The conditions existing in the Territory furnished the excuse for Congress to pass the first occupation tax law—a tax law which operates unjustly in many instances; for example, transfer companies are taxed fifty dollars per annum, regardless of the number of teams used or amount of business done. The poor man with his one-horse express pays the same as the large companies with fifty teams. This inequality applies to many other kinds of business taxed under that law.

In 1912, when Congress created the Legislative Assembly, the Legislature was given the power to tax property under the express limitations contained in Section 9 of the Organic Act, which provides

> "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year."

In view of the great development in the Territory during the sixteen years since the passage of the Act of 1899, which development has created a permanent population with millions of dollars invested in real and personal property, all of which could be reached by means of ordinary property taxation, and in view of the language contained in Section 9 above, it seems reasonable to conclude that Congress intended that the Legislative Assembly of Alaska should adopt a system of property taxation instead of continuing the excise system.

If the tax on the fish-traps be held valid as an excise or occupation tax, there will be nothing to prevent the Legislature from passing another tax law at its next session, the tax to be laid under the provisions of Section 9 of the Organic Act.

> "A general tax may be charged upon property once charged with an excise; and the power to tax it as property, subject to constitutional limitations as to the mode of taxing property, is not defeated by the fact that it has already paid an excise."

The above is the language of the syllabus in the case of *Patton v. Brady,* 184 U. S. 609.

In the event that the Legislature passes a property tax law, the cannery companies will then be required to pay four different taxes on their property, namely, a tax of four cents a case to the Federal Government; a tax of four cents a case to the Territory; a tax of one hundred dollars annually

upon each fish-trap; and a tax of one per cent. upon the value of their entire cannery plant, including the traps.

Stating the points briefly, we contend that if the Act in question is valid, plaintiff in error does not come within the spirit of the law. If the tax in question be an excise it is void because the Territory did not possess plenary power to lay an excise; if a property tax, it is void because it is not imposed in accordance with the specific rules laid down in Section 9 of the Organic Act of the Territory of Alaska; if a license tax imposed under the police power of the Territory, it is void because it is excessive in amount.

Respectfully submitted,

Z. R. CHENEY,

Attorney for Plaintiff in Error.

No. 2715

United States

Circuit Court of Appeals

For the Ninth Circuit.

ONG CHEW HUNG, Also Known as ONG GIN LUNG,

Appellant,

vs.

ALFRED E. BURNETT, Inspector in Charge, United States Immigration Office at Tucson, Arizona,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Counsel.]

Counsel for Appellant:

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Counsel for Appellee:

THOMAS A. FLYNN, United States Attorney, Phoenix, Arizona.

SAMUEL L. PATTEE, Assistant United States Attorney, Tucson, Arizona.

In the United States District Court in and for the District of Arizona.

ONG CHEW HUNG, also Known as ONG GIN LUNG,

Complainant,

vs.

ALFRED E. BURNETT, Inspector in Charge United States Immigration Office at Tucson, Arizona.

Petition for Writ of Habeas Corpus.

To the Honorable WILLIAM H. SAWTELLE, Judge of the United States District Court in and for the District of Arizona:

The complainant, Ong Chew Hung, also known as Ong Gin Lung, respectfully shows unto your Honor that he is now imprisoned, confined and restrained of his liberty by Alfred E. Burnett, Inspector in charge United States Immigration office at Tucson, Arizona, and that such imprisonment, restraint and confinement is illegal and in violation of the Constitution of the United States and in violation of the Laws and

Treaties of the United States, and is deprived of his liberty without due process of law, and more particularly the complainant alleges:

That he is a person of Chinese descent born in the Empire, now Republic, of China, and that theretofore on, to wit, the 7th day of August, 1903, the complainant came to the United States and was permitted by the proper authorities of the United States to enter the United States at the port of entry of San Francisco, State of California, as the minor son of a merchant lawfully domiciled in the United States, and that from said time to the present time the complainant has continuously resided in the United States except only that about the 27th day of January, 1910, the complainant with the intention of returning to the United States went on a temporary visit to the Republic of China and thereafter on the 27th day of July, 1911, returned to the United States and was by the proper authorities of the United States permitted to re-enter the United States as a person having the right to enter and remain in the United States, and from said time has continuously resided in the United States.

That heretofore on to wit, the 16th day of April, 1914, the Secretary of Labor of the United States issued a departmental warrant for the arrest of the complainant as a person illegally in the United States, and thereafter entered an order for the deportation of the complainant to the Republic of China, and that the complainant is now about to be deported by the United States to the Republic of China from the United States and by virtue of said

order of arrest and deportation is now confined and restrained of his liberty by said defendant Alfred E. Burnett.

That after the order for the arrest above mentioned was issued by said Secretary of Labor of the United States, there was evidence submitted to him, which evidence showed that the complainant has ever since October, 1907, been a merchant within the sense and meaning of the laws of the United States relating to the admission and exclusion of Chinese aliens and that he is now a merchant lawfully domiciled in the United States, having ever since said date October, 1907, been a *bona fide* member of the Kim Lung Chong store in San Francisco, California, which said store was a *bona fide* merchantile establishment and interest of the complainant a *bona fide* interest within the sense and meaning of the laws of the United States relating to the admission and exclusion of aliens. That said evidence so submitted to the Secretary of Labor and upon which his order for deportation of your petitioner is based, was uncontradicted and uncontroverted and therein it clearly appeared that the complainant was a merchant lawfully domiciled in the United States, but that the said Secretary of Labor erroneously and without authority of law from such evidence held that the complainant was illegally in the United States and thereupon ordered the deportation of the complainant.

That the arrest of the complainant under the order of the Secretary of Labor heretofore referred to and his confinement and imprisonment is further

illegal and without authority of law in that the complainant having lawfully entered the United States, the said Secretary of Labor was without jurisdiction and authority to order his arrest and deportation.

The complainant further alleges that he is unable to attach to this petition a complete record of the evidence submitted to said Secretary of Labor, for the reason that a complete record is not in his possession but in the possession of the said defendant.

WHEREFORE the complainant prays that a writ of habeas corpus may be granted to him directed to the said Alfred E. Burnett, Inspector in Charge United States Immigration office at Tucson, Arizona, requiring the said defendant to certify to your Honor the true cause of detention of the complainant and to bring the body of the complainant before your Honor, and to then and there abide by and to do and perform the order and judgment of this Court.

ONG CHEW HUNG.

STRUCKMEYER & JENCKES,
Attorneys for Complainant.

State of Arizona,
County of Pima,—ss.

Ong Chew Hung, also known as Ong Gin Lung, being first duly sworn, upon oath, deposes and says that he is the complainant in the foregoing complaint by him subscribed; that he has read the same and knows the contents thereof and that the same is true in substance and in fact.

ONG CHEW HUNG.

Subscribed and sworn to before me this 22d day of June, 1914.

[Seal] EDWIN F. JONES,
U. S. Commissioner.

[Endorsement]: No. C-69—Tucson. In the United States District in and for the District of Arizona. Ong Chew Hung, also known as Ong Gin Lung, Complainant, vs. Alfred E. Burnett, Inspector in Charge United States Immigration Office at Tucson, Arizona. Petition for Writ of Habeas Corpus. Filed June 22d, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Struckmeyer & Jenckes, Attorneys for Complainant.

In the United States District Court in and for the District of Arizona.

In the Matter of the Application of ONG CHEW HUNG, also Known as ONG GIN LUNG, for a Writ of Habeas Corpus.

Order for Writ of Habeas Corpus.

Upon reading the complaint and petition for a writ of habeas corpus filed herein, from which it appears to me that a writ of habeas corpus ought to issue as prayed for, it is ordered that a writ of habeas corpus issue out of and under the seal of this court directed to Alfred E. Burnett, Inspector in Charge of the United States Immigration office at Tucson, Arizona, commanding him to have the body of the petitioner before me in the courtroom of the said court on the 25th day of June, 1914, at ten o'clock A. M., on that day, and then and there to cer-

tify to this court the true cause of the detention of petitioner, and then and there abide by and do and perform the order and judgment of this court.

IT IS THEREFORE ORDERED that the petitioner, pending the hearing of this case, be admitted to bail in the sum of one thousand dollars, to be approved by the clerk.

Dated June 22d, 1914.

WM. H. SAWTELLE,
Judge of the United States District Court in and for the District of Arizona.

[Endorsement]: No. C–69—Tucson. In the United States District Court. In the Matter of the Application of Ong Chew Hung, also Known as Ong Gin Lung, for a Writ of Habeas Corpus. Order for Writ of Habeas Corpus. Filed June 22, A. D. 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy.

[Writ of Habeas Corpus.]

In the United States District Court, in and for the District of Arizona.

In the Matter of the Application of ONG CHEW HUNG, also Known as ONG GIN LUNG, for a Writ of Habeas Corpus.

The President of the United States to Alfred E. Burnett, Inspector in Charge of the United States Immigration Office at Tucson, Arizona, Greeting:

We command you that you have the body of Ong Chew Hung, also known as Ong Gin Lung, by you imprisoned and detained, as it is said, together with

the time of imprisonment and cause of said imprisonment and detention by whatsoever name he shall be called or charged, before the Honorable William H. Sawtelle, Judge of said court, at the courtroom of said courthouse in the city of Tucson within the District of Arizona, on the 25th day of June, A. D. 1914, at the hour of ten o'clock A. M., and that he do and receive what shall then and there be construed concerning the said Ong Chew Hung, also known as Ong Gin Lung, and to then and there abide by and to do and perform the order and judgment of said court and to have you then and there this writ.

WITNESS the Honorable WILLIAM H. SAWTELLE, Judge of the District Court of the United States in the District of Arizona, this 22d day of June, 1914.

Attest my hand and the seal of said court the day and year last above written.

[Seal] GEORGE W. LEWIS,
Clerk of said Court.
By Effie D. Botts,
Deputy Clerk.

[Endorsement]: No. C–69—Tucson. In the United States District Court. In the Matter of the Application of Ong Chew Hung, also Known as Ong Gin Lung, for a Writ of Habeas. Marshal's Docket No. 409. Received this writ June 23d, at 2 P. M., served same by leaving with Alfred E. Burnett at 4 P. M. J. P. Dillon, U. S. Marshal. By A. W. Forbes, Deputy. Filed June 25, A. D. 1914. By George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

In the United States District Court, in and for the District of Arizona.

ONG CHEW HUNG, *alias* ONG GIN LUNG,
Complainant,

vs.

ALFRED E. BURNETT, Inspector in Charge United States Immigration Office at Tucson, Arizona,

Demurrer.

And now comes the petitioner by Struckmeyer and Jenckes, his attorneys, and demurs to the return of the respondent Alfred E. Burnett, Inspector in Charge United States Immigration office at Tucson, Arizona, made herein and for ground of demurrer shows:

I.

That the facts stated in said return do not justify the detention of the petitioner by the said respondent and do not justify the deportation by the respondent and by the Secretary of Commerce and Labor of the petitioner to the Republic of China.

II.

That the facts stated in said return are not sufficient to constitute a defense to the petition for a writ of habeas corpus filed herein, and are not sufficient to show cause why the petitioner should not be discharged from the detention by the respondent.

III

That the return shows that the respondent and the Secretary of Commerce and Labor did not accord

to the petitioner a fair hearing, in that they arbitrarily found the petitioner to be unlawfully in this country in violatlon of the law without any evidence whatsoever having been introduced justifying such finding.

IV.

That the return shows that the detention by the respondent of the petitioner and the order of the Secretary of Commerce and Labor in ordering the petitioner deported is and was without jurisdiction.

WHEREFORE, the petitioner demurs to the sufficiency of said return, and prays that he may be discharged from further detention as he has already prayed.

STRUCKMEYER & JENCKES,
Attorneys for Petitioner.

I, F. C. Struckmeyer, one of the attorneys for the petitioner herein, do hereby certify that in my opinion the foregoing demurrer is well taken in point of law, and I do further certify that the same is not interposed for the purpose of delay.

F. C. STRUCKMEYER.

[Endorsement]: No. C–69—Tucson. In the United States District Court, in and for the District of Arizona. Ong Chew Hung, *alias* Ong Gin Lung, Complainant, vs. Alfred E. Burnett, Inspector in Charge United States Immigration Office at Tucson, Arizona. Demurrer. Filed Aug. 26, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Struckmeyer & Jenckes, Attorneys for Complainant.

[Order or Decree Denying Petition for a Writ of Habeas Corpus and Remanding Applicant to Custody.]

In the United States District Court for the District of Arizona.

C-69—TUCSON.

In the Matter of the Application of ONG CHEW HUNG, *alias* ONG GIN LUNG, for Writ of Habeas Corpus.

The above-entitled matter coming on regularly for decision this 27th day of September, 1915, at the United States District courtroom at Tucson, Arizona, at ten o'clock in the forenoon of that day; the applicant appearing in person and by Struckmeyer & Jenckes, his counsel, and Samuel L. Pattee, Esq., Assistant United States Attorney for the District of Arizona, appearing on behalf of the United States of America, and it appearing to the Court that the applicant filed his petition for a writ of habeas corpus claiming that he is illegally confined and restrain of his liberty by Alfred E. Burnett, Inspector in Charge of the Department of Immigration and Labor at Tucson, Arizona, and asking that a writ of habeas corpus be issued requiring that he be brought before this Court and that he be discharged; and thereafter a writ of habeas corpus was issued in accordance with the prayer of said petition and return was thereafter duly made to said writ and demurrer to said return filed with said Court, and documentary evidence was produced before the

Court, and same was heretofore argued and submitted to the Court for its decision, and the Court finds, after due deliberation, that the applicant is not entitled to the relief prayed for in his petition, and

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the petition of the applicant, Ong Chew Hung, *alias* Ong Gin Lung, for a writ of habeas corpus, be and the same is hereby denied, and that he be and hereby is remanded to the custody of the Inspector in Charge of the Department of Immigration and Labor at Tucson, Arizona, to abide by the rules and regulations of that department.

[Endorsements]: C–69 Tucson. In the United States District Court for the District of Arizoa. In the Matter of the Application of Ong Chew Hung, *alias* Ong Gin Lung, for a Writ of Habeas Corpus. Order Overruling Demurrer. Filed September 27th, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy.

In the District Court of the United States, in and for the District of Arizona.

ONG CHEW HUNG, also Known as ONG GIN LUNG,

Complainant,

vs.

ALFRED E. BURNETT, Inspector in Charge United States Immigration Office, at Tucson, Arizona,

Respondent.

Petition for Leave to Appeal.

Comes now the complainant, Ong Chew Hung, also known as Ong Gin Lung, and respectfully petitions the Court for an order to be entered herein, allowing his appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the order and judgment of this Court, overruling his demurrer to the return of respondent to the writ of habeas corpus heretofore issued herein, and discharging the said writ of habeas corpus, and remanding the complainant to the custody of respondent.

Complainant further petitions this Court for an order to be entered herein admitting petitioner to bail pending his appeal to the Circuit Court of the United States for the Ninth Circuit.

STRUCKMEYER & JENCKES,
Attorneys for Complainant.

In the District Court of the United States, in and for the District of Arizona.

ONG CHEW HUNG, also Known as ONG GIN LUNG,

Complainant,

vs.

ALFRED E. BURNETT, Inspector in Charge United States Immigration Office, at Tucson, Arizona,

Respondent.

Assignment of Errors.

Complainant, Ong Chew Hung, also known as Ong

Gin Lung, for his assignment of errors herein, alleges as follows:

I.

That the Court erred in overruling complainant's demurrer to the return filed herein by respondent to the writ of habeas corpus, based on the ground that the facts stated in said return do not justify the detention of complainant by respondent and do not justify the deportation of complainant to the Republic of China by respondent and by the Secretary of Labor.

II.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the facts stated in said return are not sufficient to constitute a defense to the petition for a writ of habeas corpus filed herein, and are not sufficient to show cause why complainant should not be discharged from the detention by the respondent.

III.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the return shows that the respondent and the Secretary of Labor did not accord to complainant a fair hearing in that they arbitrarily found complainant to be unlawfully in this country in violation of law without any evidence whatsoever having been introduced justifying such finding.

IV.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the return shows that the detention by the respond-

ent of the petitioner and the order of the Secretary of Labor in ordering the petitioner deported is and was without jurisdiction.

V.

That the Court erred in denying the application of complainant for his discharge under the writ of habeas corpus, in discharging said writ, and in remanding complainant to the custody of respondent.

STRUCKMEYER & JENCKES,
Attorneys for Complainant.

[Endorsements]: C-69—Tucson. In the District Court of the United States, in and for the District of Arizona. Ong Chew Hung, also known as Ong Gin Lung, Complainant, vs. Alfred E. Burnett, Inspector in Charge United States Immigration Office, at Tucson, Arizona, Respondent. Petition for Leave to Appeal. Filed September 28, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Struckmeyer & Jenckes, Attorneys for Complainant.

[Order Granting Appeal and Admitting Petitioner to Bail.]

In the United States District Court for the District of Arizona.

C-69—Tucson.

In the Matter of the Application of ONG CHEW HUNG, *alias* ONG GIN LUNG, for Writ of Habeas Corpus.

MINUTE ENTRY MADE ON SEPTEMBER 28th, 1915.

The petitioner having filed in this Court his peti-

tion for leave to appeal to the Circuit Court of Appeals for the Ninth Circuit from the order and judgment of this Court, overruling his demurrer to the return and reply to the writ of habeas corpus heretofore issued herein and denying the said writ of habeas corpus and remanding the petitioner to the custody of the marshal, and further praying for an order admitting the petitioner to bail pending his appeal to the Circuit Court of Appeals for the Ninth Circuit, it is ordered that the said appeal be and the same is hereby granted and that the petitioner may be admitted to bail pending his appeal to the said Circuit Court of Appeals for the Ninth Circuit, upon his executing bond with two or more good and sufficient sureties thereon, in penalty of three thousand dollars ($3,000), to be approved by the clerk of this court, conditioned according to law and to be filed with the papers herein.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That Ong Chew Hung, as principal, and Selim Michelson and Clinton Lauver, as sureties, are held and firmly bound unto the United States of America in the sum of three thouand dollars lawful money of the United States, for which payment, well and truly to be made to the United States of America, we bind ourselves, our heirs, executors and administrators firmly by these presents:

The condition of the above obligation is such that whereas heretofore on, to wit, the 22d day of June, A. D. 1914, the United States District Court for the

District of Arizona, in an action then pending in said court wherein the above-bounden obligor, Ong Chew Hung, is petitioner and Alfred E. Burnett, Inspector in Charge United States Immigration office at Tucson, Arizona, is defendant, entered an order and judgment awarding to the said petitioner a writ of habeas corpus, and

Whereas, on the 27th day of September, 1915, after a hearing upon the return of said defendant Alfred E. Burnett to said writ of habeas corpus the said United States District Court for the District of Arizona entered its order and judgment discharging said writ of habeas corpus and remanding the said petitioner Ong Chew Hung to the custody of the said defendant, Alfred E. Burnett, for deportation to the Republic of China, and

Whereas, the said petitioner Ong Chew Hung has appealed from said order and judgment of the United States District Court for the District of Arizona to the United States Circuit Court of Appeals for the Ninth Circuit, which said appeal has been allowed by said United States District Court for the District of Arizona by an order entered in said proceeding, and

Whereas, the said United States District Court for the District of Arizona has by order entered in said proceeding admitted the petitioner Ong Chew Hung to bail pending his said appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the sum of three thousand dollars.

Now, therefore, if the said above-bounden obligor Ong Chew Hung, shall be and appear before the

United States District Court for theDistrict of Arizona, at such time as said Court may designate, to answer the judgment of said Circuit Court of Appeals, that may be rendered against him in said proceedings, and surrender himself in execution thereof, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this 29th day of September, A. D. 1915.

ONG CHEW HUNG. (Seal)
SELIM J. MICHELSON. (Seal)
CLINTON LAUVER. (Seal)

United States of America,
State of Arizona,
County of Maricopa,—ss.

Selim Michelson and Clinton Lauver, the sureties in the foregoing undertaking, being first duly sworn, upon oath, each for himself and not one for the other, says that he is worth the sum of three thousand ($3,000) dollars over and above all his just debts and liabilities and over and above all property exempt by law from execution and forced sale, and that he is a resident and freeholder within the State of Arizona.

S. J. MICHELSON.
CLINTON LAUVER.

Subscribed and sworn to before me this 29th day of September, A. D. 1915.

(My commission expires Feby. 16, 1916.)
(Seal) JOSEPH S. JENCKES,
Notary Public.

O.K. as to form.

S. L. PATTEE,
Asst. United States Attorney,

[Endorsements]: C–69—Tucson. In the United States District Court for the District of Arizona. In the Matter of the Application of Ong Chew Hung for Writ of Habeas Corpus. Bond on Appeal. Approved and Filed this 1st day of October, A. D. 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy.

In the United States District Court for the District of Arizona.

ONG CHEW HUNG, *alias* ONG GIN LUNG,
Petitioner,

vs.

ALFRED E. BURNETT,
Respondent.

Order [Enlarging Time to November 24, 1915, to File Record on Appeal, etc.]

This matter being presented to me upon the motion of the petitioner by Struckmeyer & Jenckes, his attorneys, for an order enlarging the time within which the petitioner may file the record and docket the cause with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing to me that the time for filing said record and docketing said cause, to wit, thirty days from the 28th day of September, 1915, has not expired, and

good cause being shown to me therefor and no objection being made by the respondent,

IT IS ORDERED that the time within which the petitioner may file the record on appeal herein and docket the cause with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 24th day of November, 1915.

Dated Phoenix, Arizona, October 27th, 1915.

WM. H. SAWTELLE,
Judge.

[Endorsements]: No. C–69—Tucson. In the United States District Court, in and for the District of Arizona. Ong Chew Hung, *alias* Ong Gin Lung, Petitioner, vs. Alfred E. Burnett, Respondent. Order. Filed Oct. 27, 1915. George W. Lewis, Clerk. Struckmeyer & Jenckes, Attorneys for Petitioner.

In the United States District Court for the District of Arizona.

ONG CHEW HUNG, *alias* ONG GIN LUNG,
Petitioner,

vs.

ALFRED E. BURNETT,
Respondent.

Stipulation [That Original Return to Writ of Habeas Corpus etc. be Sent to U. S. Circuit Court of Appeals].

It is hereby stipulated by and between Struckmeyer and Jenckes, attorneys for the petitioner, and

Thomas A. Flynn, United States Attorney for the District of Arizona, representing the respondent herein, that the original of the return to the writ of habeas corpus, together with all exhibits attached thereto, may be sent up to the Circuit Court of Appeals upon the appeal herein in lieu of a copy thereof; this stipulation being made for the reason that such return contains certain exhibits of photographs and documents written in the Chinese language, of which it is impracticable to make copies.

STRUCKMEYER & JENCKES,
Attorneys for Petitioner.
THOMAS A. FLYNN,
Attorney for Respondent.

[Endorsements]: No. C–69—Tucson. In the United States District Court, in and for the District of Arizona. Ong Chew Hung, *alias* Ong Gin Lung, Petitioner, vs. Alfred E. Burnett, Respondent. Stipulation. Filed Dec. 17, A. D. 1915, at 11 A. M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

In the United States District Court for the District of Arizona.

ONG CHEW HUNG, *alias* ONG GIN LUNG,
Petitioner,

vs.

ALFRED E. BURNETT,
Respondent.

Praecipe [for Transcript of Record].

To George W. Lewis, Clerk United States District Court for the District of Arizona.

You are hereby requested to include in the transcript of the record in the above-entitled matter the following papers:

1. Petition for writ of habeas corpus;
2. Order for writ of habeas corpus;
3. Writ of habeas corpus;
4. The return to the writ of habeas corpus; (original to be sent up);
5. Petitioner's demurrer to the return;
6. Order overruling petitioner's demurrer refusing to discharge petitioner, etc.;
7. The petition for leave to appeal, etc.;
8. Order granting leave to appeal and fixing bond;
9. Bond on appeal;
10. Citation (original to be sent up);
11. Stipulation;
12. This praecipe.

STRUCKMEYER & JENCKES,
Attorneys for Petitioner.

[Endorsements]: No. C–69—Tucson. In the United States District Court, in and for the District of Arizona. Ong Chew Hung, *alias* Ong Gin Lung, Petitioner, vs. Alfred E. Burnett, Respondent. Praecipe. Filed Dec. 16, A. D. 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

[Certificate of Clerk U. S. District Court to Transcript of Record]

In the United States District Court for the District of Arizona.

No. C–69—Tucson.

ONG CHEW HUNG, *alias* ONG GIN LUNG,
Appellant,

vs.

ALFRED E. BURNETT, Inspector in Charge United States Immigration Office at Tucson, Arizona,
Appellee.

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages, number 1 to 20, inclusive, constitute and are a true, complete and correct copy of the record, pleadings and proceedings had in the case of Ong Chew Hung, *alias* Ong Gin Lung, Appellant, vs. Alfred E. Burnett, Inspector in Charge United States Immigration Office at Tucson, Arizona, Appellee, No. C–69—Tucson, as the same is called for in the praecipe, a copy of which is made a part of this transcript, as the same remain on file and of record in said District Court, and I also annex and transmit herewith the original citation in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of

$15, and that the same has been paid in full by the appellant herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona, at Tucson, in said District, this 18th day of December, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States of America, the one hundred and fortieth.

[Seal] GEORGE W. LEWIS,
Clerk United States District Court, District of Arizona.

By Effie D. Botts,
Deputy Clerk.

[Endorsed]: No. 2715. United States Circuit Court of Appeals for the Ninth Circuit. Ong Chew Hung, also Known as Ong Gin Lung, Appellant, vs. Alfred E. Burnett, Inspector in Charge United States Immigration Office at Tucson, Arizona, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Received December 22, 1915.

F. D. MONCKTON,
Clerk.

Filed December 24, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Citation on Appeal (Original).]

United States of America,
Ninth Circuit,—ss.
To Alfred E. Burnett, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, on the 24th day of November, 1915, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein Ong Chew Hung, *alias* Ong Gin Lung, is appellant and Alfred E. Burnett is respondent, to show cause if any there be why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on their behalf.

WITNESS the Honorable JOSEPH McKENNA, Justice of the United States Circuit Court of Appeals for the Ninth Circuit, this 26th day of October, in the year of our Lord one thousand nine hundred and fifteen.

WM. H. SAWTELLE,
District Judge.

[Endorsed]: No. C–69–Tucson. In the United States District Court in and for the District of Arizona. Ong Chew Hung, Appellant, vs. Alfred E. Burnett, Respondent. Citation. Service admitted this 26th day of Oct., 1915. Geo. Jones, Asst. U. S. Atty. Filed Oct. 27, A. D. 1915, at 9 A. M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

No. 2715. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 24, 1915. F. D. Monckton, Clerk.

Statement of Ong Chew Hung—March 29, 1914.

In the United States Court of Appeals for the Ninth Circuit.

C–69 (Tucson).

ONG CHEW HUNG, also Known as ONG GIN LUNG,

Appellant,

vs.

ALFRED E. BURNETT, Inspector in Charge United States Immigration Office at Tucson, Arizona,

Appellee.

Order Enlarging the Time to [December 24, 1915, to] File Record and Docket Case.

It appearing that, by reason of the size of the record in this cause and the time necessary to prepare a transcript thereof, it will be impossible to prepare the same and to file the record with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit on or before November 24th, 1915, that being the return day of citation heretofore issued and served, now therefore, for good cause shown, the undersigned, the Judge who signed said citation, does hereby order that the time to file the record in this case and to docket this case with the clerk of the United States Circuit Court of Appeals

for the Ninth Circuit, and the return day of this citation, be and the same is hereby enlarged and extended until and including the 24th day of December, 1915.

WM. H. SAWTELLE,
United States District Judge, District of Arizona.

[Endorsed]: C–69 (Tucson). Ong Chew Hung, also Known as Ong Gin Lung, Appellant, vs. Alfred E. Burnett, Inspector in Charge United States Immigration Office at Tucson, Arizona, Appellee. Order of Enlargement.

No. 2715. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Dec. 24, 1915, to file Record thereof and to Docket Case. Filed Nov. 25, 1915. F. D. Monckton, Clerk. Refiled Dec. 24, 1915. F. D. Monckton, Clerk.

In the United States District Court for the District of Arizona.

No. C–69–TUCSON.

ONG CHEW HUNG, *alias* ONG GIN LUNG,
Petitioner,

vs.

ALFRED E. BURNETT,
Respondent.

Order [Directing Transmission of Original Return to Writ of Habeas Corpus, etc., to U. S. Circuit Court of Appeals].

It being stipulated by and between Struckmeyer & Jenckes, attorneys for the petitioner, and Thomas

A. Flynn, United States Attorney for the District of Arizona, representing the respondent herein, that the original of the return to the writ of habeas corpus, together with all exhibits attached thereto, may be sent up to the Circuit Court of Appeals for the Ninth Circuit, upon the appeal herein in lieu of a copy thereof, it appearing that such return contains certain exhibits of photographs and documents written in the Chinese language, of which it is impracticable to make copies;

NOW, THEREFORE, it is hereby ordered that the clerk of this court be and he is hereby directed and ordered to mail said original return to the writ of habeas corpus together with all exhibits attached thereto, to the clerk of the Circuit Court of Appeals at San Francisco, California, by registered mail, demanding a return receipt therefor from the United States Postoffice and that said original return to the writ of habeas corpus together with all exhibits attached thereto, shall remain in the custody of the clerk of the said Circuit Court of Appeals, until such time as the Circuit Court of Appeals may have received and considered the same, and that when the same shall have been received and considered by the said Circuit Court of Appeals, shall be returned to the clerk of this court by registered mail as aforesaid.

Dated this 17th day of December, A. D. 1915.

WM. H. SAWTELLE,
Judge.

[Endorsements]: In the United States District Court for the District of Arizona. Ong Chew Hung,

alias Ong Gin Lung, Petitioner, vs. Alfred E. Burnett, Respondent. No. C–69 Tucson. Order. Filed December 17th, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify the above and foregoing to be a true, perfect and complete copy of an order made transmitting the original return to the writ of habeas corpus, together with all exhibits attached thereto, to the Circuit Court of Appeals for the Ninth Circuit upon the appeal of Ong Chew Hung, *alias* Ong Gin Lung, Petitioner, vs. Alfred E. Burnett, Respondent, C–69–Tucson, as the same appears from the original on file and of record in the clerk's office at Tucson.

WITNESS my hand and the seal of said court affixed hereto at Tucson, this 18th day of December, A. D. 1915.

[Seal] GEORGE W. LEWIS,
Clerk.
By Effie D. Botts,
Deputy.

[Endorsed]: In the United States District Court for the District of Arizona. No. C–69 Tucson. Ong Chew Hung, *alias* Ong Gin Lung, Petitioner, vs. Alfred E. Burnett, Respondent. Certified copy of Order Transmitting Original Return to Writ of Habeas Corpus to Clerk Circuit Court of Appeals for Ninth Circuit.

No. 2715. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 24, 1915. F. D. Monckton, Clerk.

In the District Court of the United States for the District of Arizona.

ONG CHEW HUNG, also Known as ONG GIN LUNG,

Complainant,

vs.

ALFRED E. BURNETT, Inspector in Charge United States Immigration Office at Tucson, Arizona,

Return to Writ of Habeas Corpus [Original].

Now comes Alfred E. Burnett, Inspector in Charge Immigration Service at Tucson, Arizona, the respondent in the above-entitled matter, and for his return to the writ of habeas corpus issued, respectfully shows:

I.

That the said Ong Chew Hung, *alias* Ong Gin Lung, was duly arrested on April 23, 1914, pursuant to a warrant of arrest issued by the Acting Secretary of Labor on the 16th day of April, 1914, charging the said Ong Chew Hung, *alias* Ong Gin Lung, with being in the United States in violation of an Act of Congress commonly known as the Immigration Act.

II.

That pursuant to the directions contained in said warrant of arrest, the said Ong Chew Hung, *alias*

Ong Gin Lung, was accorded a hearing, to enable him to show cause why he should not be deported in conformity with law, said hearing being had before me at my office in the city of Tucson, Arizon, on the 23d day of April, 1914, which hearing was continued from day to day, and concluded on May 5, 1914.

III.

That at said hearing, said Ong Chew Hung, *alias* Ong Gin [1*] Lung, was represented by counsel of his own selection, and by his said counsel introduced evidence, and was given a full and fair hearing, and no evidence offered by him was excluded.

IV.

That full and complete transcript of said hearing, and the proceedings and the evidence had thereat, were thereafter transmitted to the Secretary of Labor; and that thereafter, upon due consideration of said evidence and proceedings, the said Secretary of Labor did, on the 28th day of May, 1914, issue his warrant for the deportation of said Ong Chew Hung, *alias* Ong Gin Lung, directing that the said Ong Chew Hung, *alias* Ong Gin Lung, be deported to the country whence he came.

V.

That the said Ong Chew Hung, *alias* Ong Gin Lung, is an alien, citizen of the Chinese Republic, who came to the United States from China.

VI.

That this respondent, at the time of the issuance of said writ of habeas corpus, held the said Ong Chew Hung *alias* Ong Gin Lung, in his custody un-

*Page-number appearing at foot of page of original Return to Writ of Habeas Corpus.

der and by virtue of the said warrant of deportation so issued by the said Secretary of Labor ordering deportation in due course of procedure.

VII.

This respondent annexes to, and makes a part of this return, a true copy of said warrant of deportation and warrant of arrest, and all of the proceedings had in said matter.

WHEREFORE, Respondent prays that this writ of habeas corpus be dismissed, and that said petitioner be remanded to the custody of respondent for deportation, in accordance with [2] the warrant of deportation issued by the said Secretary of Labor.

ALFRED E. BURNETT,
Inspector in Charge,
Respondent.

THOMAS A. FLYNN,
United States Attorney for the District of Arizona.
By SAMUEL L. PATTIE,
Assistant Attorney for the Respondent.

United States of America,
District of Arizona,—ss.

Alfred E. Burnett, being duly sworn, deposes and says that he is the respondent named in the foregoing proceeding, that he has read the foregoing return, and knows the contents thereof, and that the matters therein stated are true, of his own knowledge.

ALFRED E. BURNETT.

Subscribed and sworn to before me this 25th day of June, 1914.

[Seal] GEORGE W. LEWIS,
Clerk United States District Court, District of Arizona.

By Effie D. Botts,
Deputy Clerk. [3]

[Warrant for Deportation.]

(COPY)

WARRANT—DEPORTATION OF ALIEN.

Immigration Service,
Received
Jun. 3—1914,
Tucson, Ariz.

UNITED STATES OF AMERICA.

U. S. DEPARTMENT OF LABOR.
Washington.

El Paso No. 5025/559.
No. 53780/54

To SAMUEL W. BACKUS, Commissioner of Immigration, Angel Island Station,
San Francisco, California.

WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector Alfred E. Burnett, held at Tucson, Arizona, I have become satisfied that the alien ONG CHEW HUNG, *alias* ONG GIN LUNG, who landed at the port of San Francisco, Cal., ex SS. "Chiyo Maru," on the 27th day of July, 1911, has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, to wit:

That the said alien is unlawfully within the United States in that he has been found therein in violation of the Chinese Exclusion Laws and is, therefore, subject to deportation under the provisions of section twenty-one of the above-mentioned Act,
and may be deported in accordance therewith:

I, W. B. WILSON, Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to ——— the country whence he came, at the expense of the steamship company importing him.

The execution of this warrant will serve to cancel the bond given in behalf of the alien.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 28th day of May, 1914.

HHD.

W. B. WILSON,
Secretary of Labor. [4]

[Letter, May 20, 1914, Inspector Burnett to Supervising Inspector, Transmitting Record of Hearing, etc.]

U. S. DEPARTMENT OF LABOR.
Immigration Service.
Office of Inspector in Charge, Tucson, Ariz.
May 20, 1914.

COURT RECORD.

In answering refer to No. 1503/28.

Supervising Inspector,
Immigration Service,
El Paso, Texas.

Referring to your file No. 5025/559, there is trans-

mitted herewith, in duplicate, record of hearing accorded the alien ONG CHEW HUNG, *alias* ONG GIN LUNG, pursuant to Departmental warrant No. 53780/54, dated the 16th ultimo, the charge being that said alien is unlawfully within the United States, in that he has been found therein in violation of the Chinese Exclusion Laws, and is therefore subject to deportation under the provisions of section 21 of the Immigration Act. The alien's certificate of identity No. 4753 accompanies the record. The San Francisco landing record, an exhibit in the case, should be returned for use in any habeas corpus proceedings which may eventuate.

The record discloses that this alien was admitted as the minor son of a merchant at the port of San Francisco, Cal., August 14, 1903; that following preinvestigation of his status as a merchant of Kim Lun Chong Co., of San Francisco, he departed from San Francisco in January 1910, being admitted upon his return to the same port on s/s Chiyo Maru [5]
Ong Chew Hung, 1503/28, page 2.
July 27, 1911; that he remained a few months at the store in San Francisco after his return and then proceeded to Salt Lake City, Utah, where he "visited" five or six months and then came to Phoenix, Arizona, arriving in January 1913. Soon after his arrival in Phoenix he became an active partner in the English Kitchen, a restaurant in the city of Phoenix, and was continuously employed thereafter as a laborer in said restaurant until these proceedings were instituted. The alien claims that he still retains a $1000 interest in the Kim Lun Chong Co.,

at San Francisco, but avers that he has never received any dividends from his investment therein, and that "the company was not doing sufficient business to warrant having so many around in the store, so that was the reason why I left."

It appears further from the record that this alien has never been lawfully domiciled in the United States; note his own statement (later changed after consultation with friends and counsel) that his father never had an interest in any mercantile establishment in the United States but at the time of the alien's first landing in this country his father was the proprietor of a factory engaged in making shirts and overalls in San Francisco under contract for several firms (see page 5 of the record); that his father continued to operate that factory until the San Francisco fire and earthquake and then moved with the alien and other members of the family [6] to Antioch, Cal., at which place his Ong Chew Hung, 1503/28, page 3.
father has since conducted a vegetable garden.

The record as a whole fully sustains the charge that the alien entered, and is now in the United States, in violation of the Chinese Exclusion Laws, and is therefore, subject to deportation under section 21 of the Immigration Act, and it is recommended that warrant of deportation issue accordingly.

The hearing in this case was concluded on the 5th instant, and counsel given until the 18th instant to submit brief. Counsel, without satisfactory reasons, asks further continuance of ten days to prepare

brief, but has been advised that the record will be no longer held at Tucson for that purpose.

(Signed) ALFRED E. BURNETT,
Inspector in Charge.

1sp.
Incl. 11995. [7]

Statement of Ong Chew Hung—April 23, 1914.

WARRANT HEARING.

IMMIGRATION SERVICE, MEXICAN BORDER DISTRICT.

File No. 1503/28.

In the Matter of ONG CHEW HUNG, *alais* ONG GIN LUNG, arrested pursuant to Departmental warrant No. 53780/54, dated April 16, 1914, charged with being in the United States in violation of the Chinese Exclusion laws, and, therefore, subject to deportation under the provisions of Section 21 of the Act Approved February 20, 1907, Amended by the Act Approved March 26, 1910.

Hearing had before Immigration Inspector Alfred E. Burnett in the office of the Inspector in Charge at Tucson, Arizona, on this 23d day of April, 1914.

Present: ALFRED E. BURNETT, Examining Inspector.
LEE PARK LIN, Chinese Interpreter.
F. C. STRUCKMEYER, Attorney for the Alien.
LOUIS W. LOWENTHAL, Immigrant Inspector.
ABRAM O. HADDEN, Stenographer.

Warrant presented, read, and explained to the

alien, who is advised of the nature of these proceedings, and that he may be released from custody during the pendency of the case upon furnishing a satisfactory bond in the sum of One Thousand Dollars ($1,000.00).

Medical examiner certifies good health.

[Record of Hearing Before Inspector Burnett.]

Alien sworn:

My name is Ong Chew Hung, marriage name is Ong Gin Lung; I am twenty-nine years of age; I was born in Hong Bin village, H. P. District, K. T. Province, China; I am a citizen of China; and of the Chinese race; I embarked at Hong Kong, China, and landed at the port of San Francisco, California, ex SS. "Chiyu Maru" July 27, 1911; my destination at that time was San Francisco, California; and my occupation a student; In the United States, I have a father, Ong Hung, at Antioch, California; I have four brothers in the United States; Ong Lim Him, about twenty years old; Ong Seung Fay, about sixteen years old; Ong Lung Fay, about twelve years old; a sister Ong Woy; all of these at Antioch, California; in China, wife Yee Shee; a son, Ong Wing Foo, in my native village, China. [8]

Ong Chew Hung (File 1503/28) sheet 2.

(Examining Inspector Addressing Alien.)

Q. You are advised that you have a right to be represented by counsel at this hearing? Do you wish to avail yourself to this right? A. Yes.

Q. Is Mr. F. C. Struckmeyer, who has been present from the beginning of this examination, your attorney? A. Yes.

(Examining Inspector to Mr. STRUCKMEYER.)

Mr. Struckmeyer, I hand you the record in this case, including the warrant of arrest. (Handing papers to Mr. Struckmeyer.)

(Examining Inspector Addressing Alien.)

Q. You claim to be a native-born citizen of the Chinese Republic, do you? A. Yes.

Q. Did you at Phoenix, Arizona, on March 29, 1914, through this same interpreter, make a statement to me relative to your right to be and remain in the United States? A. Yes.

Q. Did you tell the truth and nothing but the truth in that statement? A. Yes.

Q. The statement referred to will be incorporated and made a part of this hearing.

(The statement is as follows:)

In the Matter of ONG CHEW HUNG as to the Legality of His Residence in the United States.

Phoenix, Arizona, March 29, 1914.

ALFRED E. BURNETT, Examining Inspector.
LEE PARK LIN, Chinese Interpreter.
LOUIS W. LOWENTHAL, Stenographer.

Examining officer addressing alien: I am a Chinese Inspector in the service of the United States Government. I desire to take a statement relative to your right to be and remain in the United States. Any statement you may make should be voluntary upon your part, and you are warned that it may be used in any future proceedings. This statement is with particular reference to your last entry into the United States, and the legality of your residence in

this country. Are [9] you willing to make such
Ong Chew Hung (File 1503/28) sheet 3.
statement?

Answer.—Yes.

(Alien presents certificate of identity No. 4753, issued to Ong Chew Hung, merchant #26, Chiyo Maru, July 27, 1911.)

ALIEN, being first duly sworn, testified as follows:

Q. (By Examining Inspector.) What are all your names?

A. Ong Chew Hung, is my boyhood name, and Ong Gin Lung my marriage name.

Q. Have you ever been known by any other name?

A. Sometimes people call me Ong Chew only.

Q. When were you born?

A. K. S. 11, 10th month, 15th day (November 21st, 1885).

Q. In what village and district were you born?

A. Hong Bin village, H. P. Dist., K. T. Prov., China.

Q. How far is that from the Gow Mee village?

A. Between one and two lis distant.

Q. Your father's name, business, and present address?

A. Ong Hung boyhood name and Ong Gom Lung marriage name; he is now in Antioch, Cal.

Q. What is he doing there?

A. He has a garden there; he leases the land and raises asparagus.

Q. How long has he been in Antioch?

A. He went there shortly after the San Francisco fire.

Q. Been in the vegetable garden business ever since? A. Yes.

Q. When was the last time he was in China?

A. The last time was just before I was born, then he returned to the United States.

Q. Then he hasn't been back to China since you were born? A. No; that is correct.

(Q. Your mother?)

A. Jeang Shee, natural feet, now living with my father in Antioch, Cal.

Q. When did she first come to the United States?

A. I don't know how long ago it was when she came.

Q. How old were you when your mother came to the United States?

A. This mother I have reference to is not my own mother. She is my step-mother. This woman was married to my father in this country.

Q. What is your father's present wife's name?

A. Jeang Shee.

Q. What was your mother's name?

A. Quan Shee.

A. Where is she?

A. Died when I was very young in China.

Q. Was she ever in the United States?

A. No.

Q. Do you remember your own mother? [10]

Ong Chew Hung (File 1503/28) sheet 4.

A. No.

Q. How old were you when your mother died?

A. I don't know.

Q. How many brothers have you?

A. Three brothers.

Q. Are they your full brothers or half-brothers?

A. They are half-brothers.

Q. Have you any brothers born by the same mother as yourself? A. No.

Q. Did you ever have? A. No.

Q. Did you ever have any sisters born to your mother? A. No.

Q. Give the names and present addresses of your half-brothers.

A. They all live in Antioch with my father and step-mother; oldest, Ong Lim Him, about 18 years old, born in San Francisco; I don't know at what address my parents were living when this boy was born; I think they lived at 210 Jackson St., until the time of the Jackson St., fire.

Q. Were you living with your parents when this boy was born? A. I was in China.

Q. Your second half-brother.

A. Ong Seung Fay, 11 or 12 years old. Born in San Francisco; I don't know at what address.

Q. Your other half-brother?

A. Ong Lin Fay, about 11 years old, born in San Francisco; I think he was born on Jackson St.

Q. Have you any half-sisters?

A. Yes, one named Ong Moy; she is about 13 years old. My brother Seung Fay is 15 years old; I made a mistake a minute ago.

Q. Where was your sister Ong Moy born?

A. San Francisco.

Q. Have you any other half-brothers or sisters whom you have not named? A. No.

Q. Did you ever have? A. No.

Q. How many times has your father been married?

A. Twice only; once in China and once in the United States.

Q. What brothers has your father?

A. Has one brother only.

Q. Who is he and where is he now?

A. His name is Ong Jook; he is a partner in the Kin Lun Chong Co., 831 Dupont St., San Francisco.

Q. How long has he been in the United States?

A. I don't know how long. [11]

Ong Chew Hung (File 1503/28) sheet 5.

Q. Did you ever see him in China?

A. No (changes answer); yes I have.

Q. When did you last see him in China?

A. S. T. 3 (1911).

Q. Was he home then on a visit? A. Yes.

Q. What family has he?

A. He has a wife and two sons; wife, Wong Shee, and son Ong Shee, born after I came to the United States; born in the Hong Bin village; I don't remember the date of the second son's birth; I don't know his name.

Q. Was your uncle's wife or boys ever in the United States? A. No.

Q. In what village are they now?

A. Hong Bin village.

Q. When did you first come to the United States and where did you land?

A. I first came in K. S. 29, 7th month 15th day (August 7, 1903) and landed in San Francisco ex SS. "Coptic."

Q. How old were you at that time?

A. 18 years old.

Q. Under what status were you landed?

A. Landed as a merchant's son under the name Ong Chew Hung.

Q. Where was your father living at that time?

A. 210 Jackson St., San Francisco, Cal.

Q. Of whom did his immediate family consist at that time?

A. His second wife, and the half-brothers and sister I have named.

Q. At the time you first arrived in the United States did your father have with him three sons and a daughter or were any of these children born after your arrival?

A. No, they were all born before I came to this country.

Q. What was your father doing at the time you first arrived in the U. S.?

A. He was conducting a factory making shirts and overalls.

Q. Was he interested in the factory?

A. He was the owner.

Q. The sole owner? A. Yes.

Q. Where was that factory located?

A. 210 Jackson St., San Francisco.

Q. What was the name of the factory?

A. Wing Lung.

Q. How many men did he employ at that factory?

A. Between 20 and 30.

Q. What did your father do with the products of his factory?

A. He had a contract to make these shirts for several firms; Murphy-Mosstein Co., and after the shirts [12] were made up he took them to these

firms.

Q. These firms furnished the goods and he made up the goods into shirts and overalls; is that the idea?

A. Yes.

Q. How long did your father continue to operate that factory?

A. Until the San Francisco fire.

Q. When did the San Francisco fire occur?

A. April 18th, K. S. 31 or 32.

Q. Did you learn to make shirts and overalls in your father's factory? A. No, I went to school.

Q. Did you ever work in that factory at all?

A. No.

Q. Did you go to live with your father and stepmother at 210 Jackson St., as soon as you arrived?

A. Yes.

Q. How long did you live there at that address?

A. Until the San Francisco fire.

Q. And then where did you go?

A. I went to Antioch.

Q. Did your father and his family accompany you to Antioch? A. Yes.

Q. And has your father and the rest of his family continued to live at Antioch ever since? A. Yes.

Q. When your father went to Antioch from San Francisco did he immediately go into the vegetable gardening business? A. Yes.

Q. Did his family live on the ranch or in town?

A. On the ranch.

Q. How many acres of land did your father first operate in that garden?

A. About 30 acres more or less.

Q. How far is that ranch from Antioch?

A. Three or four miles.

Q. How long did you live on that ranch?

A. Until K. S. 32 when I went to San Francisco (1907).

Q. What was your occupation on the ranch?

A. I was not employed; did not do anything.

Q. How long did you live on that ranch just prior to your departure for China?

A. Before I left the ranch my father gave me some money to go to San Francisco to interest myself in the Kim Lun Chong store; that store had been re-opened.

Q. How long had you been on the ranch just before that?

A. Not quiet a year; just a few months.

Q. You say you left the ranch in K. S. 33; what month of the year?

A. 9th month (October, 1907).

Q. On what day did you depart for China? **[13]** Ong Chew Hung (File 1503/28) sheet 7.

A. S. T. 1, 12th month, 27th day (January 27th, 1910).

Q. How long did you live in San Francisco just prior to your departure?

A. From the 9th month, K. S. 33, until I life for China.

Q. How much money did your father give you to

invest in that store?

A. One thousand dollars.

Q. Did you invest it all in the firm? A. Yes.

Q. Did you buy out some other man's interest?

A. No; I just put that much money in and became a member of the firm.

Q. Who was the manager of the firm at that time?

A. Ong Chee.

Q. Is he still the manager? A. Yes.

Q. Who else were active partners in the firm at that time?

A. Ong Jook, Ong Chee, Ong Guey Hing, Hot Fat, and two more whose names I don't remember.

Q. Were you an active member of the firm?

A. Yes.

Q. In what capacity?

A. Occasionally I was sent into some interior town to make collections for the company, and other times I spent in the store.

Q. What did you do around the store?

A. Anything that was necessary.

Q. Porter and cook and that sort of work?

A. No, there was a cook employed.

Q. Was your uncle a member of the firm at that time? A. Yes.

Q. In what capacity?

A. He was the treasurer.

Q. How long did you stay in China on that trip?

A. About 17 months.

Q. And returned to the port of San Francisco?

A. Yes, in ST. 3, sixth month, first part (latter part of July or first part of August, 1911).

Q. Did you have your status preinvestigated before your departure? A. Yes.

Q. Did you get married while in China on that trip?

A. Yes, I married Lee Shee, 1st month, 21st day K. S. 2 (March 1st, 1910) in the Hong Bin village, China. We have one son Ong Wing Foo, born 9th month, 25th day, S. T. 2 (October 26th, 1910) in the same village.

Q. Did you ever have any other children?

A. No.

Q. Did you wife or son ever come to the United States? A. No.

Q. Where did you go immediately upon your return to the United States in July, 1911?

A. Went back to the Kin Lun Chong store, stayed there about 7 or 8 months, and then went to Salt Lake City. [14]

Ong Chew Hung (File 1503/28) sheet 8.

Q. What did you do during those 7 or 8 months?

A. Not employed but stayed in the store.

Q. To whom did you sell your interest in that firm?

A. I haven't sold my interest; I still retain my interest.

Q. What interest have you in the store?

A. $1,000.

Q. Did you ever receive any dividends from your investment in the store? A. No.

Q. Did you ever receive any dividends at all?

A. No.

Q. Is the firm prosperous?

A. Just makes enough to pay expenses, that is all.

Q. On what day did you go to Salt Lake City?

A. C. R. 1; I don't remember the date (1912).

Q. How long did you stay in Salt Lake City?

A. Five or six months.

Q. What did you do there?

A. I was just visiting; didn't do anything.

Q. Whom did you visit?

A. The Hop Wah store on State St.; I don't remember the address, but it is opposite the post office.

Q. Where did you go from Salt Lake City?

A. Returned to San Francisco.

Q. How long did you stay in San Francisco?

A. A little over a month, and then I came here.

Q. On what day did you arrive in Phoenix?

A. About the middle of the twelfth month, year before last (Jan. 1913).

Q. What did you do when you arrived here?

A. I became a partner in the English Kitchen and have been ever since.

Q. That is a restaurant on Adams St., in this city?

A. Yes.

Q. What kind of work did you do in the English Kitchen?

A. Manager and taking care of the dining-room.

Q. Waiting on tables, etc.? A. Yes.

Q. What wages do you receive at the English Kitchen? A. Receive no wages.

Q. Share in the profits? A. Yes.

Q. What is your investment in the restaurant?

A. $300.

Q. What is the total investment in the restaurant?

A. I own one-sixth interest.

Q. What is your monthly income from your investment in that restaurant?

A. I cannot tell just how much; sometimes I make a little and sometimes very little.

Q. Have you any interest in any mercantile establishment anywhere now?

A. I have an interest in the Kim Lun Chong Co.; that is all. [15]

Ong Chew Hung (file 1503/28) sheet 9.

Q. No interest in any mercantile establishment besides that? A. No.

Q. Did your father ever have any interest in a mercantile establishment anywhere?

A. No, except that factory.

Q. Did he ever have an interest in a mercantile establishment? A. No.

Q. Have you any relatives as near as first cousins in Arizona? A. No.

Q. Have you any personal knowledge concerning the birth of Chinese children in the United States?

A. I know of the birth of Ong Chee's son Ong Sit Chun, born in San Francisco; I don't remember when.

Q. Were you in San Francisco when this child was born? A. No.

Q. How do you know he was born there then?

A. He told me he was born in San Francisco; he and I attended school together in San Francisco.

Q. You have reference to the son of Ong Shee, who is manager of the Kim Lun Chong Co.? A. Yes.

Q. How old was that boy when you first saw him?

A. He was between 6 and 7 years old.

Q. Do you know anything concerning the birth of any other Chinese children in the United States?

A. No.

Q. Then you cannot be a witness to the birth of any Chinese child in the United States? A. No.

Q. You say you have an uncle in the Kim Lun Chong store; what is his name? A. Ong Jock.

Q. Is his full name Ong Jock Yop? A. No.

Q. As a matter of fact hasn't your uncle a brother here in Phoenix? A. No.

Q. Isn't Ong Yen Gip in Phoenix a brother of your uncle, Ong Jock? A. No.

Q. Any further statement you desire to make?

A. No.

Q. Have you understood the interpreter?

A. Yes.

Q. Have you been frightened or uneasy or sick during this examination? A. No.

Q. You made this statement freely and willingly?

A. Yes.

I HEREBY CERTIFY that the foregoing is a true transcript of the record of examination in this case.

(Signed) LOUIS W. LOWENTHAL,
Stenographer. **[16]**

Ong Chew Hung (file 1503/28) sheet 10.

Q. Do you desire to make any changes in the testimony given by you at that time?

A. At that time I stated that my father's business was a factory for manufacturing clothing, but in reality it is not a factory; it was a store where it has clothing and things like that for sale.

Q. Is that the only change you desire to make in your testimony? A. That is all.

Q. It appears from your former statement, which has been incorporated in this hearing, that you have lived in the United States prior to your last landing therein in 1911. Is that true? A. Yes.

Q. And according to your statement, you landed at the port of San Francisco, *ex.* SS. "Coptic" August 7, 1903, as the minor son of a domiciled merchant? Is that true? A. Yes.

Q. In your former statement you said that at the time you landed in the United States in 1903, your father was conducting a factory making shirts and overalls, of which factory he was the sole owner, the same being located at 210 Jackson street, San Francisco. Why do you now desire to change that statement?

A. Well, I was mistaken when I said that.

Q. You were testifying concerning a state of facts which you observed at the age of eighteen years. Were you not able to testify truthfully?

A. Because it has been so long since, I cannot remember everything.

Q. In your statement you particularized, went on to say that your father employed from twenty to thirty men in that factory and that he was making shirts for several firms, among which was Murphy-Mosstein Co., and that your father continued to operate that factory until the San Francisco fire. Do you desire to offer any explanation of this testimony?

A. The two companies which I mentioned—these

were trading with my father's place; my father sold them goods, and he also bought things from these two companies.

Q. Now, it appears from your former testimony that directly after the great earthquake and fire in San Francisco in the year 1906, you went with your father and his family to Antioch, California, where your father and you engaged in a vegetable garden. Is that correct?

A. I didn't work in the garden; my father did. I was attending school.

Q. In your former statement you said you stayed a few months at your father's vegetable garden at Antioch. Is that correct? A. I did.

Q. When you left that vegetable garden, where did you go and what did you do?

A. Went to Antioch. **[17]**

Ong Chew Hung (file 1503/28) sheet 11.

Q. How long did you stay there?

A. Full five months.

Q. What were you doing there?

A. Attending school.

Q. Then where did you go? A. San Francisco.

Q. What did you do there?

A. Became a partner in the Kim Lun Chong store, 831 Grant Avenue.

Q. On what date did you acquire that interest?

A. About the middle of October, 1907.

Q. How much interest did you acquire, and where did you get the money?

A. One thousand dollars, given to me by my father.

Q. And your father had a vegetable garden then, did he? A. Yes.

Q. And some eighteen months before had been burned out in the San Francisco fire? A. Yes.

Q. Did you become an active or silent partner in the Kim Chun Chong Company?

A. Active partner.

Q. What was your relation to the firm?

A. I did the collecting for the company, and also purchasing goods for the company.

Q. Your uncle was the manager of that firm, wasn't he? A. Yes.

Q. Now, as a matter of fact, were not you merely a porter or salesman around that store kept there by your uncle?

A. No, it is not so; I was interested to the extent of one thousand dollars in the store.

Q. When did you thereafter leave the United States for China? A. January 7, 1910.

Q. Had your status preinvestigated before your departure? A. Yes.

Examining Inspector.—I will introduce the San Francisco, California, record "In re Ong Chew Hung, merchant departing, serial No. 885," and this record will be marked Exhibit "A" and become a part of the record of this hearing. (San Francisco record handed to Attorney Struckmeyer.)

Q. (Addressing alien.) Now, where did you go immediately after your return to the United States in July, 1911.

A. Went to the Kim Lun Chong store, San Francisco.

Q. How long did you stay there?

A. About six or seven months.

Q. What did you do during those six or seven months?

A. Was in the same capacity as I was before going to China.

Q. Then where did you go?

A. To Salt Lake City, Utah.

Q. How long did you stay there? **[18]**

Ong Chew Hung (file 1503/28) sheet 12.

A. About five or six months.

Q. What did you do there?

A. Was not employed during all that time.

Q. Then where did you go?

A. Returned to San Francisco.

Q. How long did you stay this time?

A. Four or five weeks.

Q. Then where did you go?

A. Went to Phoenix, Arizona.

Q. You have testified that you arrived in Phoenix in January, 1913, and became a partner in the English Kitchen and Restaurant in that city. Is that true?

A. I did not become a partner in the English Kitchen until August of last year.

Q. What did you do from January until August, last year?

A. I was traveling to various places; been to Lordsburg; not doing anything.

Q. Did you work in a restaurant in Lordsburg?

A. No.

Q. Are you still a partner in the English kitchen?

A. Yes.

Q. What kind of work do you do there?

A. I was out in the dining-room and taking care of the patrons of the restaurant; that was all.

Q. Waiting on the tables as a waiter?

A. Yes, occasionally.

Q. To whom did you sell your interest in the Kim Lun Chong store?

A. I still retain my interest in the store.

Q. Is the firm prosperous?

A. Not very, just sufficient to pay expenses.

Q. Did you ever receive any dividends from your investment in the firm? A. No.

Q. Why didn't you continue to be an active member of the firm after you returned from China?

A. Because the company was not doing sufficient business to warrant having so many around in the store; so that was the reason why I left.

Q. Your father still at the garden in Antioch?

A. Yes.

Q. Did you ever see your father before you came to the United States, at the age of eighteeen years?

A. No.

Q. Was your mother ever in this country?

A. No, she died in China.

Q. Remember ever having seen her? A. No.

Q. You frankly admit that you are a laborer now in the United States, do you not?

A. Yes, in case the store which I am interested in need my services I would go back to my own store.

Q. Any further statement you desire to make to show cause why [19] you should not be deported

Ong Chew Hung (file 1503/28) sheet 14.

in conformity with law?

Mr. STRUCKMEYER.—I ask the courtesy of the Inspector in Charge, to grant me further time in which to consider the question whether to offer any evidence, and if so the character thereof.

(Examining Inspector to Mr. STRUCKMEYER.)

Hearing is continued until 10:30 A. M. the 24th instant, for the purpose indicated by counsel.

[Hearing Before Inspector Burnett—Proceedings Had April 24, 1914.]

Continued Hearing in the Case of ONG CHEW HUNG, *alias* ONG GIN LUNG, on the 24th day of April, 1914, at 10:50 A. M., at the office of the Inspector in Charge, Tucson, Arizona.

Present: ALFRED E. BURNETT, Examining Inspector.
LEE PART LIN, Chinese Interpreter.
F. C. STRUCKMEYER, Attorney for the Alien.
LOUIS W. LOWENTHAL, Immigrant Inspector.
ABRAM O. HADDEN, Stenographer.

(Examining Inspector.)

Q. Are the alien and his counsel ready to proceed?

Mr. STRUCKMEYER.—Not this morning, and I ask that the further hearing of this case be continued for a reasonable time to afford me the opportunity to introduce evidence, if, in my opinion, such evidence will tend to establish his right to remain in the United States. I am not asking this continuance for delay, but solely in the interest of justice,

and I state frankly to the Inspector that I do not know whether or not we will introduce any evidence; that I ask a reasonable time in which to determine that fact.

Examining Inspector.—The further hearing in this case will be continued to 11:30 A. M. the 29th instant. **[20]**

Ong Chew Hung (file 1503/28) sheet 15.

On April 29, 1914, at the request of counsel, further hearing in this case was continued until May 5, 1914. The case is reopened at this hour.

[Hearing Before Inspector Burnett—May 5, 1914.]

Continued Hearing in the Case of ONG CHEW HUNG, *alias* ONG GIN LUNG, on the 5th day of May, 1914, at 10:40 A. M. at the Office of the Inspector in Charge, Tucson, Arizona.

Present: ALFRED E. BURNETT, Examining Inspector.
LEE PART LIN, Chinese Interpreter.
F. C. STRUCKMEYER, For the Alien.
J. S. JENCKES, For the Alien.
ABRAM O. HADDEN, Stenographer.

(Examining Inspector Address Alien and Counsel.)

Q. Are you ready to proceed in this case?

Mr. STRUCKMEYER.—Yes, we are.

(Examining Inspector to Mr. STRUCKMEYER.)

Does counsel desire to offer any evidence at this time?

Mr. STRUCKMEYER.—I desire to offer the affidavit of Ong Hong, father of the alien, and of Ong Chee.

Examining Inspector.—The affidavit of Ong Hong,

executed at San Francisco, California, May 2, 1914, is received and marked "Ong Chew Hung's Exhibit A." The affidavit of Ong Chee, executed at San Francisco, California, May 2, 1914, is received and marked "Ong Chew Hung's Exhibit B."

(Examining Inspector to Mr. STRUCKMEYER.)

Is there any further testimony that defense desires to offer at this time?

Mr. STRUCKMEYER.—Nothing further.

[Statement of Ong Chew Hung, May 5, 1914.]

(Examining Inspector Addressing Alien.)

Q. Is there any *further you* desire to make to show cause why you should not be deported in conformity with law? **[21]**

Ong Chew Hung (file 1503/28) sheet 16.

A. When first I got to Phoenix, I was doing nothing, but intended to go into business, but seeing that the time was not good for to open any business, and I had asked Inspector Partch whether it would be permissible for me to work and he replied in the affirmative.

Q. When did you have that conversation with Inspector Partch?

A. It was either in July or August of last year, just before I went to the restaurant.

Q. Is that all you desire to say?

A. No, I have nothing further to state.

Q. The alien may be at liberty on the bond already filed until he is notified to appear for further hearing, in accordance with its terms.

(Examining Inspector to Mr. STRUCKMEYER.)

Has counsel prepared a brief in this case, or does

counsel desire to submit a brief?

Mr. STRUCKMEYER.—I desire to submit a brief and could do so by the 18th instant.

(Examining Inspector to Mr. STRUCKMEYER.)

The record of this hearing will be held in this office until the date indicated by counsel and for the purpose of enabling him to submit brief.

Finding [of Inspector Burnett, etc.].

From the foregoing evidence, the alien Ong Chew Hung, alias Ong Gin Lung, who landed *ex* SS. "Chiyo Maru" at San Francisco, California, July 27, 1911, is found to be in the United States in violation of the Act approved February 20, 1907, amended March 26, 1910, for the following reasons, to wit: that the said alien entered, and has been found in, the United States in violation of the Chinese exclusion laws, and is, therefore, subject to deportation under the provisions of section 21 of the above-mentioned Act.

IT IS, THEREFORE, RESPECTFULLY RECOMMENDED to the Honorable Secretary of Labor that said alien be deported to China, the country whence he came, in accordance with the provisions of sections 20 and 21 of the Immigration Act.

(Signed) ALFRED E. BURNETT,
Examining Inspector. [22]

Ong Chew Hung (File 1503/28) sheet 17.

I HEREBY CERTIFY that the foregoing is a true and correct transcript of the record of hearing in this case.

ABRAM O. HADDEN,
Stenographer, [23]

Alien's Exhibit "A" and "B."

Furnished by attorney for alien in the original only. This has gone forward with the record to the Department. **[24]**

[Warrant to Take Alien into Custody and Grant Him a Hearing.]

(COPY.)

WARRANT—ARREST OF ALIEN.

UNITED STATES OF AMERICA.

Received.
Apr. 21, 1914.
Immigration Service.
Tucson, Ariz.

U. S. DEPARTMENT OF LABOR.
WASHINGTON.

El Paso No. 5025/559.
No. 53780/54.

To F. W. BERKSHIRE, Supervising Inspector, El Paso, Texas, or to any Immigrant Inspector in the service of the United States.

WHEREAS, from evidence submitted to me, it appears that the alien ONG CHEW HUNG, *alias* ONG GIN LUNG, who landed at the port of San Francisco, Cal., ex SS "Chiyo Maru," on the 27th day of July, 1911, has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, for the following among other reasons:

That the said alien is unlawfully within the United States in that he has been found therein in violation

of the Chinese Exclusion Laws, and is therefore subject to deportation under the provisions of Section twenty-one of the above-mentioned Act,

I, J. B. Densmore, Acting Secretary of Labor, by virtue of the power and authority vested in me by the Laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law.

The expenses incident to conveying the alien from Phoenix to Tucson, Arizona, for hearing, as well as the expenses of detention, if necessary, are authorized, payable from the appropriation "Expenses of Regulating Immigration, 1914." Pending disposition of his case the alien may be released from custody upon furnishing satisfactory bond in the sum of $1000.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 16th day of April, 1914.

(Signed) J. B. DENSMORE,
Acting Secretary of Labor. [25]

HHD

Tucson, Arizona, May, 22, 1914.

WARRANT—ARREST OF ALIEN.

ONG CHEW HUNG, *alias* ONG GIN LUNG.

Executed and hearing accorded April 23, 1914, at Tucson, Arizona.

(Signed) ALFRED E. BURNETT.
Immigrant Inspector.

ONG CHEW HUNG.
S. F. FILE CASE OF ONG CHEW HUNG.
Tucson file No. 1503/28.
TO BE RETURNED TO S. F.
4/17/14 **[26]**

[Exhibits.]

U. S. DEPARTMENT OF LABOR.
BUREAU OF IMMIGRATION.
SUBJECT: EXHIBITS. NO. 53780
54 **[27]**

[Certificate of Identity.]

DESCRIPTION

63

Name Ong Chew Hung
Age 5 11 Height 5 11 Weight 145 lbs
Occupation Merchant Race Japanese
Identified as Merchant Number 1 Class
Ex. China Manila July 27 11
Personal marks and peculiarities Large scar left top
neck Scar on right top of neck
Issued at the port of San Francisco, Cal.
this 4 day of August 1911
Sargent H. Backus
Immigration Officer in Charge

No. 4753

ORIGINAL

THE UNITED STATES OF AMERICA

CERTIFICATE OF IDENTITY

ISSUED IN CONFORMITY WITH A REGULATION OF THE DEPARTMENT OF COMMERCE AND LABOR, ADOPTED MARCH 19, 1909.

This is to certify that the person named and described on the reverse side hereof has been regularly admitted to the United States as of the status indicated thereon; that satisfactory proof has been submitted to the undersigned that the certificate issued to such person heretofore was lost, mislaid, or destroyed without fault on the part of such person, and is granted solely for the identification and protection of such person in his status; that such status remains unchanged; to insure the attachment of evidence of the issuance of this certificate a duplicate of said person is written on the reverse side hereof, and his photograph is attached, with his name written partly across, and the official seal of the United States Immigration officer signing this certificate impressed partly over said photograph.

Department of Commerce and Labor
IMMIGRATION SERVICE

CERTIFICATE OF IDENTITY

NAME Ong Chew Hung

No. 4753

[Receipt for Certificate of Identity, etc.]

Application taken by Hoyt

L.M. Date 7/31/11

Ong Chew Hung

San Francisco, Cal., AUG 15 1911, 191.

RECEIVED FROM COMMISSIONER OF IMMIGRATION, Port of San Francisco,

Certificate of Identity No. 4753, issued in the

Name Ong Chew Hung Age 26

Height: 5 feet, 4½ inches Occupation Merch. S.F.

Place S.F. Physical marks Large scar left lip of mole scar on right top of nose behind ear

Admitted as Merchant, Kim Lun Chong Co No. 72 SS China, Mam

(date) July 27, 1911 Date of first arrival in U.S.

U.S. 29-6-15 Mex. Dom you register? (If not, give reasons) Not in U.S.

Have you any other papers showing your right to be and remain in the United States? Landing paper herewith

Address where identification card should be sent

Kim Lung Chong Co. 831 Clay St. S.F.

Ong Chew Hung

Applicant.

AUG 15 1911

Attest:

YongKay

29

[Identification Record.]

EXEMPT CLASS landed direct from steamer. San Francisco, No. 26, SS. "Chiyo Maru," July 27, 1911.

Class, Merchant.

What are all your names? Ong Chew Hung; Ong Gin Lung.

How many times have you been married? (Give names of wives, dates of marriage, kind of feet, whether living.) Once; Yee Shee; S. T. 2-1-21; N. F.

How many children have you ever had? One boy no girl.

Give name, sex, age, date of birth, and present location of each:

Name.	Age.	Sex.	Birthdate.	Location.
Ong Wing Foo	2	M.	S. T. 2-9-25	China.

Did you take any money, letters, or anything else from the U. S. to anyone in China on this trip? No.

Are you accompanied by anyone? (If so, whom.) No.

SWORN.

[Chinese Signature.]
ONG CHEW HUNG,
Applicant.

(Signatures) W. D. HEITMAN,
Inspector.

WHOE TONG,
Interpreter. [30]

[Letter, January 6, 1910, Chinese Inspector to Inspector in Charge.]

DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.
OFFICE OF THE COMMISSIONER
SAN FRANCISCO, CAL.
Jan. 6, 1910.

Inspector in Charge.
Chinese Division, I. S.

Sir:

In re, Ung Chow Hung, Merchant departing, serial #885, I have to report.

I have examined the store of Kim Lan Chang & Co., 831 Dupont St. in which the applicant claims an interest and find it to be a genuine mercantile establishment with none of the prohibited features. The mercantile status of applicant is established by two credible witnesses other than Chinese. The statements of the applicant and of the manager of the store are O. K. I recommend favorable action.

Respectfully,
EDWARD L. LAWRENCE,
Chinese Inspector, [31]

[Statement of Ong Chew Hung—February 18, 1910.]

Jan. 7.
Chinese Division, San Francisco.
#885 ONG CHEW HONG.
Merchant departing.
Insp.—LAWRENCE.
Intp.—DEAN.
Steno.—CEM.
App. sworn.
Q. What are your names?

A. Ong Chew Hong, no other name not married, have no children.

Q. How old are you? A. 24, born in China.

Q. When did you first come to this country?

A. KS–29.

Q. How many times have you returned?

A. Never.

Q. What is your business?

A. Merchant Kim Ljng Chong Co., 831–33 Dupont.

Q. How long have you been a member of this firm?

A. 2 years.

Q. How many partners in your firm? A. 25.

Q. Capital? A. $16,000.

Q. How much is your interest? A. 1000.

Q. What are your duties? A. Salesman.

Q. What is the manager's name?

A. Ong Chew.

Q. For a year last past have you done any laboring work outside of this store? A. No.

Q. All of your time was devoted to your business was it? A. Yes. Store has no prohibited features.

Q This is a genuine mercantile establishment and you're a genuine merchant of this city are you?

A. Yes.

2–18–10, Angel Island, Cal.

[Chinese Signature.] [32]

Q. Has this store any prohibited features?

A. No.

Q. This is a genuine mercantile establishment and this man is a genuine merchant of this city is he?

A. Yes.

2–18–10, Angel Island, Cal. [34]

[Statement of H. Sultan—February 17, 1910.]

Chinese Division, San Francisco.

#885 ONG CHEW HUNG.

Merchant Departing.

Insp.—LAWRENCE.

Steno.—CEM.

Wit. sworn.

Q. What is your name? A. H. Sultan.

Q. What is you business?

A. Manufacturer of knit goods, 519 Cal.

Q. Does your business bring you in contact with Chinese? A. Yes.

Q. Do you know this man, showing photo of applicant?

A. Ong Chew Hung, known him 2 *o* 3 years.

Q. What is his business?

A. Merchant, Kim Lun Chong Co., 831 Dupont.

Q. How many times have you visited this store within the last year? A. 3 or 4 times a week.

Q. What is this man doing when you go there?

A. Salesman.

Q. Do you believe that he is a member of this firm? A. Yes.

Q. Can you state that for a year last past he did no laboring work out*ide* of this store? A. No.

Q. All of his time was devoted in his business was it? A. Yes.

Q. Has this store any prohibited features?

A. No.

Q. This is a genuine mercantile establishment and this man is a genuine merchant of this city is he?

A. Yes.

2–17–10, Angel Island. [35]

[Affidavit of F. McGrath, January 6, 1910.]

San Francesco, Jan. 6/10.

In re ONG CHEW HUNG, Mer. Dept. Serial No. 885.

Frank McGrath, being duly sworn, deposes and says that he is a drayman, #738 Sacramento St., S. F.

That he recognizes the photo shown as that of applicant, whom he has known two years.

That he is a merchant of Kim Lun Chung & Co., #831 Dupont St., S. F., acting as salesman and a member of the firm.

That this is a genuine mercantile establishment, with none of the prohibited features, and that this man is a genuine merchant of this city and for more than one year last past he has done no laboring work outside of this store.

F. McGRATH.

Subscribed and sworn to before me this 6th day of Jan. 1910.

EDWARD L. LAWRENCE,
Chinese Inspector. [36]

[Affidavit of Wm. A. Beseman and H. Sultan, December 30, 1909.]

WHEREAS, Ong Chew Hung, a merchant, and a member of the firm of Kim Lun Chong, doing business at No. 831 Dupont Street in the City and County of San Francisco, State of California, is about to make a temporary visit to China,

NOW, THEREFORE, we, the undersigned, upon each being duly sworn depose and say:—

That we are well acquainted with the above-named Ong Chew Hung; that he is a merchant, and a member of the firm of Kim Lun Chong doing business at No. 831 Dupont Street, in the City and County of San Francisco, State of California; that he has been such merchant for over one year next preceding his intended departure, and has done no manual labor in and about said business, excepting such as was absolutely necessary in the conduct thereof.

WM. A. BESEMAN,
28 Geary St.
H. SULTAN,
519 Calif. Str.

Subscribed and sworn to before me this 30th day of Dec. 1909.

CHAS. F. DUISENBERG,
Notary Public, in and for the City and County of San Francisco, State of California. [37]

[Affidavit of Ong Chew Hung, Dec. 30, 1909.]

In the matter of :
Ong Chew Hung, :
A Merchant. :

State of California,
City and County of San Francisco. - ss.

Ong Chew Hung upon being duly sworn deposes and says:

That he is a merchant, and a member of the firm of Kim Lun Chong, doing business at No. 831 Dupont Street, in the City and County of San Francisco, State of California; that he has been such merchant for over one year next preceding his intended departure; that he has done no manual labor in and about said business, excepting such as was absolutely necessary in the conduct thereof; that he is about to make a temporary visit to China, and makes this affidavit in order to facilitate his landing upon his arrival at the Port of San Francisco.

Ong Chew Hung

Subscribed and sworn to before me
this 30th day of Dec. 1909.

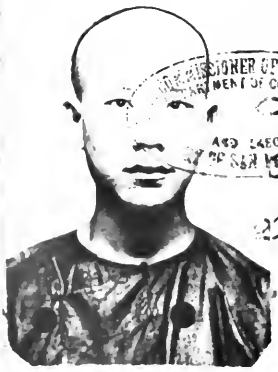
Notary Public,
for the City and County of
San Francisco, State of California.)

State of California)
) ss.
City and County of San Francisco)

Ong Hung, being duly sworn, says; that he is a merchant residing and doing business in said City and County of San Francisco, at No. 210 Jackson Street, under the firm name of Wing & Co.; that the photograph hereto attached is the photograph of his son, Ong Show; that Ong Show was born at Hong Ben village, Hoy Ping District, Quong Tong Province, China, on the 15'th day of the 10'th month of the 11'th year of the reign of Quong Suey (November 21'st, 1885); that Ong Show is about to come to the United States to join his father, this affiant, at San Francisco and this affidavit is made to facilitate his landing upon his arrival at San Francisco.

Ong 鄔洪 Hung

Subscribed and sworn to before me this
5th day of November 1902
Thos L. Burnett
Notary Public
In and for the City and County of San Francisco
State of California



Landed aug 14=1903
S. S. "Coptic" aug. 6=03
San Francisco. Cal.
K.
W. W. Smith
COMMISSIONER OF IMMIGRATION,
PORT OF SAN FRANCISCO.

age

State of California)
) ss.
City and County of San Francisco)

We, the unedrsigned, residents of the City and County of San Francisco, State of California, being duly sworn, each for himself, says;that I know Ong Hung, whose photograph is here to attached and have known him for several years last past; that Ong Hung is a merchant, residing and doing business in said City and County of San Francisco, at No. 210 Jackson Street under the firm name of Wing & Co.; that for more than one year last past Ong Hung has not performed any manual labor other than such as was necessary in the conduct of his business as such merchant.

Name.	Residence.
Matthew Unger	782 O'Farrell St.
Jas. K. Kapsl	1305 Bryant St.
Thos. S. Gardner	212 Jackson St.

Subscribed and sworn to before me this 5th day of November 1902
Thos. S. Burns
Notary Public
In and for the City and County of San Francisco
State of California

[Endorsed]: In the Matter of Ong Chew Hung, a Merchant. Merchant's Certificate.
Merchant Departing.

Serial No. 885.
Name—Ong Chew Hung.
Residence—S. F.
Firm—Kim Lun Chong Co.
Filed—Jan. 3, 1910.
Received from—G. Straus.

PORT OF SAN FRANCISCO, CAL.
Jan. 6, 1910.

The application of the within-named Chinese has been investigated and his mercantile status for one year prior to the above date has been established.

CHARLES MEHAN,
Inspector in Charge.

Approved:

T. M. CRAWFORD,
Acting Commissioner of Immigration.

[Endorsed]: 16. "Coptic," Aug. 6, 1903. Duplicate. In re Ong Show a Merchant's Son. Affidavits in His Behalf. [41]

[List of Cases Used in Connection With Case.]

No. ————.

(NAME) (STEAMER) (DATE)

CASES USED IN CONNECTION WITH ABOVE CASE.

No.	Name.	Steamer.	Date.	Relationship.
.....	.....	.....		
.....	.....	.....		
.....	.....	.....		

[42]

[Endorsed]:

LANDING JACKET.

DEPARTMENT OF COMMERCE AND LABOR.

IMMIGRATION SERVICE.

Ticket—26, Cor. No. ———.

Name—Ong Chew Hung.

Class—Merchant.

Place—San Francisco.

Ex. S. S. "Chiyo Maru, Jul. 27, 1911.

I respectfully recommend admission.

————————,

Inspector in Charge.

Inspector in Charge Chinese Division.

Land within-named Chinese passenger on identification.

CHARLES MEHAN,

Acting Commissioner of Immigration.

Chinese Inspector————.

Comply with above order.

————————,

Inspector in Charge.

I have this day landed the within-named Chinese, as per above order.

W. H. WEBBER,
Chinese Inspector.

(Date) Jul. 27, 1911.

Cert. identity 4753, Aug. 10, 1911. [43]

[Endorsed]: C–69 (Tucson). In the United States District Court, District of Arizona. In the Matter of the Application of Ong Chew Hung, also Known as Ong Gin Lung, for Writ of Habeas Corpus. Return to Writ of Habeas Corpus. Filed June 25, A. D. 1914, at — M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

No. 2715. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 24, 1915. F. D. Monckton, Clerk. [45]

[List of Cases Used in Connection With Case.]

No. ————.

(NAME) (STEAMER) (DATE)

CASES USED IN CONNECTION WITH ABOVE CASE.

No.	Name.	Steamer.	Date.	Relationship.
.....	.....	.....		
.....	.....	.....		
.....	.....	.....		

[42]

[Endorsed]:

LANDING JACKET.

DEPARTMENT OF COMMERCE AND LABOR.

IMMIGRATION SERVICE.

Ticket—26, Cor. No. ———.

Name—Ong Chew Hung.

Class—Merchant.

Place—San Francisco.

Ex. S. S. "Chiyo Maru, Jul. 27, 1911.

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Inspector in Charge Chinese Division.

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CHARLES MEHAN,

Acting Commissioner of Immigration.

Chinese Inspector————.

Comply with above order.

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Chinese Inspector.

(Date) Jul. 27, 1911.

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No. 2715. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 24, 1915. F. D. Monckton, Clerk. [45]

No. 2715

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

ONG CHEW LUNG, Also known as ONG GIN LUNG,

Appellant.

vs.

ALFRED E. BURNETT, Inspector in Charge, United States Immigration Office at Tucson, Arizona,

Appellee.

Brief of Appellant

Upon Appeal From the United States District Court for the District of Arizona.

STRUCKMEYER & JENCKES
Attorneys for the Appellant.
Phoenix, Arizona

No. 2715

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

ONG CHEW HUNG, Alias ONG GIN LUNG,

Appellant.

vs.

ALFRED E. BURNETT, Inspector in Charge, United States Immigration Office at Tucson, Arizona,

Appellee.

STATEMENT OF THE CASE.

The appellant, a Chinese alien, was arrested by the appellee, Alfred E. Burnett, Inspector in Charge United States Immigration Office at Tucson, Arizona, pursuant to a warrant of arrest issued April 16, 1914, by the acting Secretary of Labor, under Section 23, Act of Congress March 4, 1913, charging the appellant with being unlawfully in the United States in violation of the Chinese Exclusion Law. A hearing was had before the appellee at Tucson, Arizona, on April 23 and 24th, 1914, and on May 5th, 1914, at which hearings evidence was received by the appellee, from which evidence the Secretary of Labor on May 28th, 1914, adjudged the appellant unlawfully in the United States in violation of

the Chinese Exclusion Act and ordered his deportation to the country whence he came.

The appellant thereupon filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona, alleging in substance that such finding and order of the Secretary of Labor was against the uncontroverted evidence and without authority in law. The writ having been granted, the appellee made return thereto, setting up the issuance of the warrant of arrest mentioned, the hearing before him and the subsequent order of deportation, and attaching to his return the full evidence taken before him and upon which the order of deportation was based.

The appellant demurred to the return of the appellee upon the grounds that the facts stated in said return do not justify the deportation of the appellant and are not sufficient to show cause why the appellant should not be discharged from detention by the appellee, that the return shows that the appellant was not accorded a fair hearing in that he was arbitrarily found to be unlawfully in the United States without any evidence justifying such finding, and that the order of the Secretary of Labor is and was without jurisdiction. This demurrer was overruled by the District Court, the writ of habeas corpus denied, and the appellant was thereupon remanded to the custody of the appellee. From this judgment, this appeal is prosecuted, and the question therefore presented on this appeal is whether or not the action of the Secretary was fair, regular and lawful, and whether or not the evidence taken before the appellee

and attached to the return and upon which the order of deportation by the Secretary of Labor is based, justifies the finding that the appellant is unlawfully in the United States in violation of the Chinese Exclusion Laws.

The evidence taken at the hearing before the appellee consisted on the part of the Government, solely of the examination of the appellant and of the so-called landing records of the appellant on which he was admitted. From this it appeared:

On November 5, 1902, Ong Hung, was conducting a business under the firm name of Wing & Co., at 210 Jackson Street, San Francisco, claiming to be a merchant. He made affidavit of his mercantile status on this date supported by the affidavits of three white witnesses. The affidavit of Ong Hung stated that Ong Show (the appellant) whose photograph was attached to the affidavit was his son and about to come to the United States and that his affidavit was made to facilitate the son's landing. Upon this affidavit and the affidavit of the three white witnesses, the appellant was landed at the port of San Francisco and admitted on August 14, 1903. (Tr. R. 74, 75 and endorsement thereon.) The appellant was then between seventeen and eighteen years of age. He went to live with his father until the San Francisco fire, going to school. (Tr. R. 44.) The appellant's father's business was destroyed in the San Francisco fire and his father then went to Antioch, going into the vegetable gardening business, to which place the appellant accompanied his father, staying there for about a year attending school,

when in the middle of October, 1907, he went to San Francisco purchasing a partnership interest in the Kim Lun Chong store at 831 Grand Avenue, with money given him by his father. (Tr. R. 46-52.) He immediately became an active member in the store, doing the collecting and purchasing goods for the Company, but doing no manual labor. Of this firm Ong Chee, an uncle of the appellant, was the treasurer. (Tr. R. 46.) The appellant stayed in the store until January 7, 1910, when he left for China on a visit. (Tr, R. 46-53.) Prior to his departure for China, the appellant made application for the pre-investigation of his status as a merchant, and his status as a merchant was investigated and approved. (Tr. R. 65-78 inclusive.)

The appellant returned to the United States and was readmitted at the port of San Francisco on July 27, 1911. (Tr. R. 78-79.) The appellant returned to the Kim Lun Chong store where he stayed for about seven or eight manths and going from there to Salt Lake City, where he stayed for about seven or eight month, returning to San Francisco, staying there for a short period of time and coming to Phoenix, Arizona, in January, 1913. (Tr. R. 47-48-54.) During all this time he was concededly not engaged in any manual labor until August, 1913, when he acquired an interest in a restaurant at Phoenix, Arizona, known as the English Kitchen. He was not engaged in manual labor of any kind, but intended to go into business, but, conditions being unfavorable, he asked Immigration Inspector Parch whether it would be permissible for him to work to which he

received an affirmative answer. Thereupon he acquired the interest in the English Kitchen mentioned, (Tr. R. 58) and while conducting this restaurant he was arrested upon the warrant issued. ,

There is no evidence in the record attacking the father's status as a merchant at the time of the appellant's entry, except this: On March 29, 1914, prior to the appellant's arrest and prior to the issuance of the warrant for his arrest he was subjected to an examination, not under oath and through an interpreter, by the appellee. Being asked the nature of his father's business in 1902 he answered: "He was conducting a factory making shirts and overalls." (Tr. R. 43.) At the hearing, however, before the appellee, the appellant under oath stated that he desired to change this statement, that it was not a factory, but "a store where it has clothing and things like that for sale." (Tr. R. 50, 51, 52.) No steps appear to have been taken to bring about the father's deportation, but, it affirmatively appears that at the time of the hearing he was still living in Antioch, Cal., engaged in gardening. (Tr. R. 39, 40.)

SPECIFICATIONS OF ERRORS.

I.

That the Court erred in overruling complainant's demurrer to the return filed herein by respondent to the writ of habeas corpus, based on the ground that the facts stated in said return do not justify the detention of complainant by respondent and do not justify the depor-

tation of complainant to the Republic of China by respondent and by the Secretary of Labor.

II.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the facts stated in said return are not sufficient to constitute a defense to the petition for a writ of habeas corpus filed herein, and are not sufficient to show cause why complainant should not be discharged from the detention by the respondent.

III.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the return shows that the respondent and the Secretary of Labor did not accord to complainant a fair hearing in that they arbitrarily found complainant to be unlawfully in this country in violation of law without any evidence whatsoever having been introduced justifying such finding.

IV.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the return shows that the detention by the respondent of the petitioner and the order of the Secretary of Labor in ordering the petitioner deported is and was without jurisdiction.

V.

That the Court erred in denying the application of

complainant for his discharge under the writ of habeas corpus, in discharging said writ, and in remanding complainant to the custody of respondent.

BRIEF OF THE ARGUMENT.
POINTS AND AUTHORITIES.

a. The action of the administrative officers of the United States, charged with the duty of investigating the status of the alien, determining the status of the alien as one of the exempt class and permitting him to enter the United States, is prima facie evidence of the alien's right to be and remain in the United States.

Lin Hop Fong vs. U. S., 209 U. S. 463.
In re Tam Chung, 223 Fed. 801.

b. The alien's right to enter and remain in the United States, so determined by the administrative officers of the United States, in a proceeding of this character must be overcome by the United States and unless so overcome the alien's right to be and remain in the United States remains proved. (Sec. 3, Act May 5, 1892, casting upon the Chinese alien the burden of the proof, has no application to proceedings upon departmental warrant.)

Lin Hou Fong vs. United States, supra.
Lew Ling Chong vs. United States, supra.
U. S. vs. Lee Yon Wing, 211 Fed 941.

c. The evidence to overcome such prima facie right so established must be substantial. Mere suspicion, fantastic doubt created, is not sufficient.

d. If in the absence of such substantial evidence

the Secretary of Labor order the deportation of an alien such order is arbitrary and unfair, and subject to review and correction on an application for the writ of habeas corpus.

Whitfield vs. Hanges, 222 Fed. 751.
Ex parte Lam Pui, 217 Fed. 458.
M'Donald vs. Sin Tak Sam, 225 Fed 710.

e. "One lawfully entering the United States can lawfully change his vocation and can labor of right and not of privilege and without incurring the penalty of deportation."

In re Tam Chung, 223 Fed. 803.
U. S. vs. Lew Chee, 224 Fed. 447, (C. C. A. 2nd C.)
U. S. vs. Foo Duck, 172 Fed. 856, C. C. A. 9th C.)
Lew Ling Chong vs. U. S., 222 Fed. 196.

f. The warrant contains no allegation of a fact or facts advising the appellant of the charge against him, and did not, therefore, confer jurisdiction upon the Secretary, or invest the subsequent hearing with that fairness exacted by law necessary to constitute due process of law.

Whitfield vs. Hanges, 222 Fed. 748 (C. C. A. 8th C.).
Ex parte Lew Lin Shew, 217 Fed. 317.

g. The proof offered to be *legally sufficient* must be "of such a character and volume that it might well satisfy a rational mind of the truth of the position it is introduced to maintain" and the Court must examine the proof with both respect to its quality and quantity.

Metropolitan R. R. Co. vs. Moore, 121 U. S. 568.

ARGUMENT.

Should this alien be deported the harshness thereof must forcibly strike the mind. The alien came to the United States in 1902 when a boy less than eighteen years of age, not clandestinely, but brought here openly by his father with the express sanction and approval of the United States. He acquired a residence, a domicile, here. Even Chinese aliens are permitted to acquire a residential domicile within our borders. He lived here continuously for eleven years prior to his arrest, unmolested under the all-seeing eyes of the inspectors. He went to school. In October, 1907, then twenty-two years of age he became a member of the mercantile firm of Kim Lun Chong, 831 Grant Ave., San Francisco, California. He became an active member of the firm and was such on January 6th, 1910, when he made application for pre-investigation to the Immigration Department at San Francisco. He was pre-investigated, most searchingly it would appear from the record, and his status as a merchant was approved. He departed for China on a visit and was readmitted as a merchant on July 27th, 1911. Now it is sought to deport him to the land of his nativity. Why? Because it is claimed his original entry in August, 1903, was fraudulent, that his father was not then in truth a merchant but a factory-owner—a laborer—and as such not entitled to have his minor child admitted, and that at the time of his arrest he was found laboring. The latter reason is wholly dispelled by the now universally

accepted rule that the merchant may labor when forced to do so.

That eleven years after his entry he was found laboring means nothing. Judge Morrow said,

> "But, when the Chinese person has obtained admission lawfully under the statute, and without any trick, deception, or fraud has become domiciled in the United States for a period of seven years, we do not see how he can be deported if during that time he has been found temporarily performing acts of labor."
>
> U. S. v. Foo Duck, 172 Fed. 856.

He had been a merchant for years, this must be conceded, the official findings of the immigration officers clearly prove this; he returned for a visit to China; he was re-admitted; he stayed for some time in the store of which he was a member; business was poor and he came to Phoenix to open a store;

> "but seeing that time was not good for to open in business and I had asked Inspector Partch whether it would be permissible for me to work and he replied in the affirmative." (Tr. R. 58.)

This is not to be denied. If Inspector Partch had not made this statement to the alien surely it would have been denied by him. Inspector Partch understood the alien's condition and evidently he but explained the law to him.

We therefore are forced back to find an excuse for the order of deportation to a possible claim that the alien's father was not a merchant in 1903 at the time of the alien's first entry. The Secretary may deport within three years after the entry of the alien. May he

search back eleven years to find cause of deportation in the father's status? We doubt the propriety thereof.

But it is immaterial here, for the record is wholly barren of evidence impugning the father's status as a merchant. Momentary suspicion only is cast upon his status by the statement made by the alien some time on March 29th, 1914, (not at the hearing) that his father was, at the time of the son's entry, (in 1903) "conducting a factory making shirts and overalls" of which he was the owner. This statement was made to the inspector at the inspector's request for a statement, and through an interpreter. (Tr. R. 38, 43.) At the hearing in this proceeding the alien testified under oath concerning this statement.

Q. "Do you desire to make any changes in the testimony given by you at that time?"

A. "At that time I stated that my father's business was a factory for manufacturing clothing, but in reality it was not a factory; it was a store where it has clothing and things like that for sale." (Tr. R. 50, 51.)

The alien further testified that he was mistaken when he stated to the Inspector that his father's place of business was a factory; that it was a long time since and that he did not remember. It must be borne in mind that the appellant had not worked in his father's place in San Francisco, but went to school. (Tr. R. 44.)

In the face of this explanation this Court certainly cannot assume that an alien, a Chinese alien, could, in the City of San Francisco, conduct a large establishment in a manner rendering him subject to deportation and remain immune from deportation by the immigra-

tion officials. To assume this we must also absolutely assume that the immigration officials were corrupt in the discharge of their duties.

Immediately after the fire the father moved to Antioch, California, and became a laborer. He is still in Antioch, no steps whatever have been taken to secure his deportation. Why not? If the entry of the son in 1903 was unlawful it can only be because his father was then in this country in violation of law and subject to deportation. Were all the immigration officials at San Francisco asleep? Not merely slumbering but willfully closing their eyes?

Of both the father's and the son's presence in the United States since 1902, as affecting the son's present right to remain, based on the claimed illegality of the father's presence, it may fitly be said:

> "If he was unlawfully within the country in 1910 (1902) it was the duty of the officials of the government to have taken steps at that time to have him arrested and deported. The fact that during this *long period of inaction* the government made no move against him *implies a lack of confidence* in *its case.*"
>
> Judge Sanborn in: U. S. vs. Lee You Wing, 211 Fed. 946 (C. C. A. 8th C.)

This alien lived with his father on the ranch at Antioch until October, 1907, when on arriving of age he became a member of the Kin Lung Chong store of which he is now a member. He was a member of that firm, actively engaged as a member in the business of the firm, when, in January, 1910, he made application for pre-investigation on his intended departure from the

United States, then claiming his status as a merchant. To support his claim he gave the names and furnished the affidavits of three white witnesses that he was a member of the exempt class, in addition to the affidavit of Ong Chee, manager of the store. His claim as merchant was thoroughly investigated by the inspectors, the witnesses and the store were examined, (Tr. R. 66 to 77) with the result that Edward L. Lawman, Chinese Inspector, reported to the inspector in charge that "the mercantile establishment of which this alien is a member is a genuine mercantile establishment and that the status of the applicant as a merchant has been established" and recommends favorable action. (Tr. R. 66.) We then find the following,

> "Port of San Francisco, California, January 6th, 1910. The application of the within named Chinese has been investigated and his mercantile status for one year prior to the above date has been established." (Signed) Chas. Mehan, Inspector in Charge. Approved: F. M. Crawford, Acting Commissioner of Immigration. (Tr. R. 77.)

His departure as a merchant and his right to re--enter the United States as a merchant is investigated by the officers of the United States charged with the duty of so doing. Upon the faith of this finding the alien departs, he returns to the United States and is re-admitted by the Immigration Officials charged with the duty of then again investigating his right to re-enter. Shall the alien now be deported upon the mere suspicion that his father in 1903 may have conducted a factory for the manufacture of shirts and overalls instead of a store for the sale of shirts and overalls? The latter is

the testimony in this case, the former the suspicion cast of which no evidence whatever has been introduced except the extra-judicial statement of the alien, later denied and explained, and which is wholly refuted by the conduct of the United States in acquiescing for a number of years in the legality of the status of the parent.

Is this bare admission, later denied under oath, and the force of which is wholly destroyed by the action of the officials of the United States, substantial evidence? Judge Connor in Ex parte Lam Pui, 217 Fed. 457, has very clearly stated the true meaning of the term, adopting the following definition of evidence:

> "Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied." Draft, Code.

After reviewing the authorities Judge Connor holds that unless such evidence is in the record the order of deportation is subject to review on habeas corpus.

Ex parte Lam Pui, 217 Fed. 467.

This alien came to the United States when less than eighteen years of age, he is now past thirty; as well said by another District Judge: Deportation in this case would be tantamount to expatriation, banishment. Instead of being an honest enforcement of the laws of the United States it is the overzealous endeavor of the servants of the United States to force a deportation wholly devoid of justice and merit.

In many respects this case is not unlike United States vs. Lee Yon Wing, 211 Fed. 939, wherein the Circuit Court of Appeals for the 2nd Circuit, refused the depor-

tation of a Chinese alien whom they found to have been a merchant, but who had become the owner of a laundry; nor in many respects unlike United States vs. Lee Chee, 224 Fed. 448, decided by the same court, refusing deportation of a Chinese alien laborer, though his right to remain, based on a communicated status, appears from the opinion to have been somewhat doubtful.

The Government called no witnesses, introduced no evidence, other than the examination of the appellant. Though the Government be not foreclosed from questioning the verity of his testimony, this is certain: you may not take therefrom an isolated word here and there, seeking therewith to construct an artifice upon a base of doubt, but the entire testimony must be "of such character and *volume* that it might well satisfy the rational mind of the position it is introduced to maintain" (121 U. S. 568), only then is it *legally sufficient*.

Several questions of law arising on this appeal, and the points whereof have been stated, are likewise involved in No. 2714 and we are content to rest upon the argument of the same therein made, craving the indulgence of the Court so to do.

Respectfully submitted,

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Attorneys for Appellant.

No. 2715.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Ong Chew Hung, also known as Ong Gin Lung,
Appellant,

vs.

Alfred E. Burnett, Inspector in Charge United States Immigration Service at Tucson, Arizona,
Appellee.

BRIEF OF APPELLEE.

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Appellee.

BRIEF OF APPELLEE.

The brief for the government in the companion case of Ong Seen v. Burnett, No. 2714, was written before the receipt of the brief of counsel for the appellant. That brief was written upon the basis of the argument made in the court below, but since receiving and reading the briefs of the appellants in these two cases, it is seen that some of the positions taken by them in the District Court have been abandoned, and some points made that were not presented to that court. Following

the example of counsel for the appellants, it is therefore asked that what is said in this brief and the authorities herein cited may be considered as applying also to the other case.

STATEMENT OF THE CASE.

The appellant was held for deportation under an order of the Secretary of Labor, who assigned the following ground for deportation:

"That the said alien is unlawfully within the United States in that he has been found therein in violation of the Chinese exclusion laws, and is therefore subject to deportation under the provisions of section 21 of the above-mentioned (Immigration) act."

On August 14, 1903, the appellant was admitted at the port of San Francisco, Cal., as the minor son of a merchant, and the record of that landing is included in the return in this case. Some three years subsequent to his landing he proceeded with his father and other members of the family to the vicinity of Antioch, Cal., where the family engaged in vegetable gardening. It appears further from the testimony that in the year 1907 he returned to San Francisco and became connected, ostensibly as a partner, in a mercantile firm in that city. Further, that based upon that mercantile relation, he applied to the immigration officers at San Francisco for a return certificate as a merchant, made a trip to China in 1909, returning in 1911, within less than three years from the time these deportation proceedings were instituted. Soon after his return to the United States on this occasion he proceeded to Phoenix, Ariz., where he at once became an active partner

and laborer in a restaurant. The appellant claims that he still retains his interest in the San Francisco mercantile firm, but avers that he has never received any dividends from his investment therein.

ARGUMENT.

I.

The original entry of the appellant was unlawful.

It is contended that his original entry was unlawful because on the facts disclosed by the record his alleged father was not then a merchant within the meaning of that term, as it is defined by the Act of Congress of November 3, 1893. That act defines a merchant in the following language:

"The term 'merchant' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

By this language Congress intended a complete and comprehensive definition of the term merchant, and as was said by this court:

"It will be observed that the definitions of the act are very careful and confined, and we may not enlarge them."

Lai Moy v. U. S., 66 Fed. 955.

Under this definition, the evidence justified the conclusion of the immigration officers that the father of

this alien was not a merchant within this statutory definition at the time the alien first landed. The alien at a hearing held under the departmental warrant proceedings, same being part of this record, gave testimony from which we quote the following:

"Q. When did you first come to the United States, and where did you land?

A. I first came to the United States in KS 29, 7th month, 15th day (August 7, 1903), and landed in San Francisco, ex ss Coptic.

Q. How old were you at that time?

A. 18 years old.

Q. Under what status were you landed?

A. Landed as a merchant's son, under the name Ong Chew Hung.

Q. Where was your father living at that time?

A. 210 Jackson street, San Francisco, Cal." [Transcript of Record, pages 42-43.]

* * * * * * * * *

And again:

"Q. What was your father doing at the time you first arrived in the United States?

A. He was conducting a factory, making shirts and overalls.

Q. Was he interested in the factory?

A. He was the owner.

Q. Sole owner?

A. Yes.

Q. Where was the factory located?

A. 210 Jackson street, San Francisco.

Q. What was the name of the factory?

A. Wing Lung.

Q. How many men did he employ at that factory?

A. Between 20 and 30.

Q. What did your father do with the products of his factory?

A. He had a contract to make these shirts for several firms; Murphy-Mosstein Co., and after the shirts were made up he took them to these firms.

Q. These firms furnished the goods and he made up the goods into shirts and overalls, is that the idea?

A. Yes.

Q. How long did your father continue to operate that factory?

A. Until the San Francisco fire." [Transcript of Record, pages 43-44.]

* * * * * * * * *

"Q. And then where did you go?

A. I went to Antioch.

Q. Did you father and his family accompany you to Antioch?

A. Yes.

Q. And has your father and the rest of his family continued to live at Antioch ever since?

A. Yes.

Q. When your father went to Antioch from San Francisco, did he immediately go into the vegetable gardening business?

A. Yes.

Q. Did you live on the ranch or in the town?

A. On the ranch." [Transcript of Record, page 44.]

* * * * * * * * *

"Q. Did your father ever have any interest in a mercantile establishment anywhere?

A. No, except that factory.

Q. Did he ever have an interest in a mercantile establishment?

A. No." [Transcript of Record, page 49.]

It is true that at a later day the alien attempted to change or modify his testimony so as to lay the foundation for a claim that his father was a merchant at the time of the son's first entry, but it was obviously for the immigration officers to determine which statement was truthful. And it excites no surprise that they believed the statement he first made, with no object in falsifying, in preference to that which was later made, when he may have been advised as to the law and had an opportunity to consult with friends and had learned the effect of his prior testimony. It goes without saying that when a witness makes contradictory statements, the question of which is truthful is entirely one for the triers of fact, and even were this court considering the question as on appeal, a finding based on one of the conflicting statements could not be disturbed. Certainly, under the limited power of review on *habeas corpus,* the court's inquiry is ended when it sees that there was some evidence tending to sustain the findings of the immigration officers.

It may be regarded as established, therefore, that the occupation of the father at the time this alien first landed was as testified by the alien in the first instance. The question of law, therefore, is whether one manufacturing garments for others under contract, and not engaged in the sale of the manufactured products, but solely engaged in manufacturing for others, is a merchant. Bearing in mind that the statutory definition which, as held by this court, must be narrowly construed, provides that a merchant is one who "Is a person engaged in buying and selling merchandise at a fixed place of business," it is obvious that the ap-

pellant's father was not at the time referred to a merchant. He might be termed a manufacturer, a contractor, or a manufacturing contractor, but he would not be a merchant within the ordinary meaning of that term, even were there no statutory definition.

State v. Richeson, 45 Mo. 575.

But taking into consideration the fact that Congress has by its definition narrowed the ordinary meaning of a merchant and effectually prevented any enlargement of its meaning beyond the strict letter of its terms, no room for doubt is left that upon the facts which the immigration officers were justified in finding, and did find, the alien's father was far outside the statutory definition of the term merchant.

As showing further that the term merchant, after being defined by Congress, has been given a narrow construction, and that those not strictly within its terms have been considered either laborers or at least not within the exempt classes, see the following cases:

United States v. Gin Hing, 8 Ariz. 416;
United States v. Chung Ki Foon, 83 Fed. 143;
In re Leung, 86 Fed. 303;
Mar Bing Guey v. United States, 97 Fed. 576;
United States v. Yong Yew, 83 Fed. 832;
Lai Moy v. United States, 66 Fed. 955;
United States v. Yee Gee You, 152 Fed. 157;
Lew Quen Wo v. United States, 184 Fed. 685.

The appellant entered this country in the first instance as the minor son of a merchant, and only by virtue of that status. If his father were not then a

merchant, he was not the son of a merchant and had no right to enter the United States. If, nevertheless, he succeeded in obtaining entry into this country, he was unlawfully here and was at all times subject to deportation.

II.

The appellant could acquire no right to remain in this country if his original entry was unlawful.

If the appellant's father were not a merchant, the entry of the appellant was unlawful, and he was subject to deportation. No subsequent act of his could place him in any better position. His becoming a merchant subsequently could avail him nothing.

United States v. Chu Chee, 93 Fed. 797.

It follows, therefore, that the original entry of this alien being unlawful, he acquired no status as one of the exempt classes by any conduct of his own within this country, and having departed from this country and returned, he could only lawfully return by procuring from the Chinese government and presenting at the port of entry the certificate required by section 6 of the Chinese Exclusion Act (Act of Congress of May 6, 1882, amended by Act of July 5, 1884). This he failed to do, hence his last entry into the United States in 1911 was in violation of a law of the United States, to-wit: the Chinese exclusion laws, and therefore the alien was subject to deportation under an order of the Secretary of Labor, pursuant to authority conferred by section 21 of the Immigration Act of February 20, 1907.

III.

The preinvestigation and permission to return is of no effect.

Nothing is better settled than that the admission of an alien by immigration officials is not an adjudication of the right of the alien to enter, and is not conclusive in a subsequent proceeding looking to the deportation of the alien.

Lew Quen Wo v. United States, 184 Fed. 685;
Pearson v. Williams, 202 U. S. 281;
Li Sing v. United States. 180 U. S. 486;
United States v. Lim Jew, 192 Fed. 644;
Ex parte Wing Yee Toon, 227 Fed. 247.

When the appellant himself gave testimony which, if true, would overcome any presumption or showing arising from the pre-investigation proceedings, and which affirmatively showed that he was unlawfully in this country, it was not error to order his deportation.

IV.

The warrant issued by the Department of Labor is sufficient.

For the first time in this court it is claimed that the departmental warrant does not state sufficient facts to advise the appellant of the charge against him. The warrant charges him in general terms with being in the United States unlawfully, in violation of the Chinese exclusion acts. The answer to this suggestion is found in a recent ruling of Judge Bledsoe, that "the proceeding being of necessity essentially summary in

itself, no over-refined niceties in the way of pleading are to be expected nor demanded." In the case in which this language was used the objection was made that the warrant failed to state in what manner the petitioner had been connected with a house of prostitution, and this objection was overruled by the court.

Ex parte Hidekuni Iwata, 219 Fed. 610.

Moreover, the alien went to hearing without any objection on this ground, though represented by counsel. He made no claim of any insufficiency of the warrant or any indefiniteness of the matter stated in it, but on the contrary himself offered evidence and was fully heard in support of his right to remain in the United States. The hearing proceeded from beginning to end without objection to the sufficiency of the warrant, and without suggestion on the part of the alien or his counsel that there was any lack of particularity or any failure to fully inform him of the charge against him. In these circumstances, then, any such objection, even if well founded, must be regarded as waived.

Grant Bros. Const. Co. v. U. S., 232 U. S. 647.

Certainly no more strictness is required in a departmental warrant, by which proceedings of this character are initiated, than in a complaint in a proceeding for deportation before a United States commissioner. The Circuit Court of Appeals of this circuit has held that a complaint simply charging the accused with being unlawfully within the United States, without specifying in any particular in what respect his pres-

ence is unlawful, or in what respect he had violated the Chinese exclusion law, was sufficient, the court saying, "The complaint was in the usual form in such cases, and we think sufficiently pleaded the ultimate fact involved in the charge."

Ex parte Jim Hong, 211 Fed. 73.

V.

The admissibility of affidavits.

Again, complaint is made in this court for the first time that certain affidavits were erroneously admitted. But proceedings before immigration officials are not governed by the rules of evidence prevailing in courts of law.

United States v. Uhl, 215 Fed. 573.

And *ex parte* affidavits are admissible.

Ex parte Garcia, 205 Fed. 53.

These affidavits were received by the immigration officials without objection, though counsel for the alien was present, full opportunity was given to answer any of the statements contained in them, and no request was made for an opportunity to cross-examine the affiants or for time to controvert their statements. The appellant is therefore in no position to complain of the admission of the affidavits or statements.

Ex parte Hidekuni Iawata, 219 Fed. 610;

In re Rhagat Singh, 209 Fed. 700.

VI.

The extent of review on Habeas Corpus.

The record shows that the appellant was given a fair hearing before the immigration officials.

Choy Gum v. Backus, 223 Fed. 487.

"Where a fair, though summary, hearing has been given, in ascertaining whether there is or is not any proof tending to sustain a charge involved in a case like this, it is not open to courts to consider either admissibility or weight of proof according to the ordinary rules of evidence, even if it believe the proof was insufficient and the conclusion wrong."

Frick v. Lewis, 195 Fed. 693; affirmed in 233 U. S. 291.

It is submitted that there was abundant evidence in this case to sustain the conclusion of the Department of Labor, and that the order of the court below should be affirmed.

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